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ABSTRACT

The contents of this document are organized in nine chapters. Chapter One is "An Overview." Chapter Two presents "Seven Alternative Economic Models." Chapter Three discusses "Matching Pupils to Schools." Chapter Four compares "Vouchers and Other State Plans for Aiding Private Schools." Chapter Five describes "The Demonstration Project: Specifications and Evaluation." Chapter Six discusses "Four Additional Economic Models," which have come up most often in discussions with educators, legislators and community groups. Chapter Seven discusses "Identifying Children with Special Educational Needs," focusing on the technical problems of determining the value of vouchers for particular students, asssuming vouchers vary in value according to educational "need." Chapter Eight, "Problems in Matching Pupils to Schools," examines in detail the prevention of segregation, the need for excess capacity in a voucher system, late applicants and running a lottery. Chapter Nine, "Problems in a Demonstration," focuses on problems unique to a demonstration; viz. problems of phasing into a voucher system, the financial consequences of a demonstration for the public schools, schools that want to fill only a fraction of their places with voucher students, financial arrangements with parochial schools, and alternative structures for an educational voucher agency. [For the preliminary report, see ED 040265.] (Author/JM)

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EDUCATION VOUCHERS

A REPORT ON FINANCING ELEMENTARY EDUCATION BY GRANTS TO PARENTS

This report was prepared under
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by

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Preface

Adam Smith seems to have been the first social theorist to propose that the government finance education by giving parents money to hire teachers. Since then the idea has enjoyed recurrent popularity. Smith's ideal of consumer sovereignty is built into a number of American programs for financing higher education, notably the G.I. Bill and various state scholarship programs. Federal, state and local expenditures for elementary education have, however, been largely confined to schools that are actually managed by public officials.[1] Parents who did not like the neighborhood school provided by their local board of education have had to seek a private alternative, and they have had to pay the full cost out of their own pockets.

In December, 1969, the U.S. Office of Economic Opportunity (OEO) made a grant to the Center for the Study of Public Policy to support a detailed study of "education vouchers". ("Vouchers" are a convenient label for certificates which the government would issue to parents, parents would give to an eligible school, and the school would return to the government for cash.) In March, 1970, the Center submitted a Preliminary Report to OEO dealing with the possible use of vouchers at the elementary school level. The text of this Preliminary Report is reprinted in its original form as Section I of the present Report. The legal appendices to the Preliminary Report appear, with some modifications, as Appendices A, B, and E of the present Report.

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[1] A number of states make tuition grants to handicapped children who cannot be accommodated in the local public schools, so that the child can attend a private school instead. There are also states with remote rural districts that still have no secondary schools, and these districts often pay students' tuition in neighboring districts or in private schools. Several Southern states have tried to use tuition grants to evade federal court orders to integrate their public schools, but these schemes have all been struck down by the courts. A number of foreign countries have also recognized the principle that parents who are dissatisfied with their local public school should be given money to establish alternatives. For a description of the Danish system, see Estelle Fuchs, "The Free Schools of Denmark," Saturday Review, August 16, 1969.

The Report examined a wide variety of possible voucher systems and considered the potential difficulties posed by each. It concluded that some proposed voucher systems were unworkable, that some were unconstitutional, and that many would work against the interests of disadvantaged children. But it also concluded that certain kinds of voucher systems might substantially improve the education of elementary school children, especially the disadvantaged. The Preliminary Report therefore recommended that OEO try to find a local school district willing to conduct a 5-8 year demonstration of a suitable voucher system.

After completing its Preliminary Report, the Center embarked on an eight month investigation of the feasibility of conducting a demonstration project of the general type it had recommended. Superintendents of schools in all cities which were in full compliance with federal requirements regarding racial integration and which had a 1960 population in excess of 150,000 were contacted by mail. Expressions of interest in the voucher concept from cities of all sizes were followed up by Center staff. Public meetings were held in interested cities around the country. State and local school officials were contacted, as were interested teachers groups, parents' organizations, civic groups and non-public schools.

In the course of this field work a number of practical problems about implementing the proposal in Section I arose. A number of alternative approaches and restrictions were also suggested. In the fall of 1970, the Center therefore prepared Section II of the present Report, as well as Appendices C, D, and F.

In a few instances, Section II suggests minor modifications in the guidelines proposed in the Preliminary Report and reproduced in Section I. The basic proposal has not, however, been altered in significant ways. Our work with local communities has confirmed our judgment that a voucher system should include the kinds of restrictions proposed in Section I. It has also convinced us that if restrictions are too rigid, a voucher system is likely to be indistinguishable from the present public school system. Most of all, however, our field work has convinced us that the issues we discuss in Section II are usually best resolved at the local level, in the light of local conditions.

The present document is the product of many hands. No one who worked on it agrees with every idea presented in it, but we have all read and commented on one another's work. The contributors included:

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A special mention must also be given to the work of Miss Sharon Sosnick and Miss Laura Jennings of the Center for the Study of Public Policy in overseeing the production of this report and to Miss Nancy Truelson in typing it.

1. An Overview

The Case for Competition and Choice

Conservatives, liberals, and radicals have all complained at one time or another that the political mechanisms which supposedly make public schools accountable to their clients work clumsily and ineffectively. Parents who think their children are getting inferior schooling can, it is true, take their grievances to the local school board or state legislature. If legislators and school boards are unresponsive to the complaints of enough citizens, they may eventually be unseated, but it takes an enormous investment of time, energy, and money to mount an effective campaign to change local public schools. Dissatisfied though they may be, few parents have the political skill or commitment to solve their problems this way. As a result, effective control over the character of the public schools is largely vested in legislators, school boards, and educators, not parents.

If parents are to take responsibility for their children's education, they cannot rely exclusively on political processes to let them do so. They must also be able to take *individual* action in behalf of their own children.

At present, only relatively affluent parents retain any effective control over the education of their children. Only they are free to move to school districts with "good schools" (and high tax rates). Only they can afford non-sectarian private schooling. The average parent has no alternative to his local public school unless he happens to belong to one of the denominations that maintains low-tuition church schools. Only a few denominations do.

The system of education vouchers proposed in this report will, we believe, encourage the development of many new alternatives, open to every parent. This would make it possible for parents to translate their concern for their children's education into action. If they did not like the education their child was getting in one school (or if the child did not like it), he could go to another. By fostering both active parental interest and educational variety, a voucher system should improve all participating schools, both public and private.

Under the proposed voucher system, a publicly accountable agency would issue a voucher for a year's schooling for each eligible child. This voucher could be turned over to any school which had agreed to abide by the rules of the voucher system. Each school would turn in its vouchers for cash. Thus, parents would no longer be forced to send their children to the school around the corner simply because it was around the corner. If the school was attractive and desirable, it would not be seriously affected by the institution of a voucher plan. If not, attendance might fall, perhaps forcing the school to improve.

Even if no new schools were established under the voucher system, the responsiveness of existing schools would probably increase. But new schools will be established. Some parents will get together to create schools reflecting their special perspectives or their children's special needs. Educators with new ideas -- or old ideas that are now out of fashion in the public schools -- will also be able to set up their own schools. Entrepreneurs who think they can teach children better and cheaper than the public schools will also have an opportunity to do so.

None of this ensures that every child will get the education he needs, but it does make such a result more likely than at present.

All these arguments have, of course, been used over and over to justify the maintenance of free markets and competition in areas other than education. Why, then, have virtually all American communities allowed elementary and secondary education to remain a monopoly or at best a duopoly?[1]

Monopoly situations are usually justified by one of three arguments:

- "Competition would be technologically inefficient in this field."
- "Consumers are not competent to distinguish between good and bad products in this field, so competition would lead only to more imaginative forms of fraud."
- "Competition in this field would encourage consumers to maximize their private advantages in ways that are inimical to the general welfare."

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[1] Public subsidies are normally available for a child's education only if he attends a school managed by the local board of education. In most cases the child's family has little or no choice about which school this will be.

Church subsidies are available in many communities if the child attends a parochial school, but there is seldom much competition between public and parochial schools. This reflects the fact that neither the public nor the parochial system has any economic incentive to expand. On the contrary, when either the public or the parochial system increases its share of the market, it must either decrease its expenditures per pupil or increase its tax or tithing rate. Additional students thus mean more financial problems, not fewer. The result is that both systems have a vested interest in the other's continued survival and popularity.

The incentives affecting independent schools are somewhat more effective, since most independent schools charge enough tuition to cover the marginal cost of adding a student. Independent schools therefore have an economic incentive to broaden their appeal and please more parents. But their share of the market remains limited by the fact that they get no outside subsidy. As a result, they have little impact on the range of alternatives open to the majority.

Let us examine the applicability of these three arguments to education.

The "technological" argument for educational monopoly may have had some relevance in the days when most Americans lived in sparsely settled rural areas. It was hard to get enough children together in one place to pay a single teacher's salary. Competition could (and sometimes did) prevent any school from being established. Today, however, most Americans live in densely populated areas, where it is perfectly feasible to maintain several competing schools within reasonable distance of any family. Logistical arguments against diversity, competition, and choice in education have therefore become irrelevant.

Proponents of public monopoly also talk a good deal about economics of scale, especially at the high school level. There is, however, no solid evidence that such economies are real. Big schools can provide certain resources (a physics lab, a Spanish teacher, a swimming pool, etc.) at less cost than small schools. But nobody knows whether these resources increase the likelihood that a school will turn out competent, civilized adults. Recent disorders in many big high schools suggest that massing large numbers of adolescents together in the same place may actually be dysfunctional. The possibility that competition might result in smaller schools need not, then, be viewed with alarm. It could be very healthy.

The "gullible consumer" argument for educational monopoly is only slightly more persuasive. There are instances (e.g. prescription drugs) where consumers really cannot judge the products offered them. Rather strict regulation seems appropriate in these areas. In order to justify governmental regulation, however, it is necessary to show that the government is harder to gull than the individual consumer. This is fairly easy to do in the case of drugs. The government presumably has access to scientific evidence about the effects of each drug, and this evidence is not readily available or comprehensible to laymen. Analogous arguments with respect to schooling seem more tenuous. The government can obtain "expert" opinions about the effects of any given school on various types of children, whereas the average parent cannot obtain such opinions. But there is no evidence that "experts" really know any more than parents about the likely effects of specific schools on specific children. There is no consensus about what causes what in education, much less any scientific evidence to back a consensus. This makes it hard to argue that the government should protect children from their parents' naivete by denying the parents choice about their children's schooling and imposing what the government's experts happen to think "best."

Even if we were to accept the argument that "experts know best," it would not follow that the best solution would be to make education a public monopoly. We do not, after all, have a public monopoly on the production or distribution of drugs, even though we assume that "doctors know best." Instead, we have a publicly regulated market, in which the patient is free to choose both a doctor and a druggist. It would be perfectly possible to establish a similarly regulated market in education. Indeed, such a market already exists--but only for the affluent. The state establishes certain basic rules about what a school has to do before opening its doors to the public. These rules cover physical safety, teacher qualifications, and the like. But in most respects affluent parents are free to send their children to any kind of school they want. It is hard to see why affluent parents should be judged competent to select their children's schools from a wide range of alternatives while poorer parents are given no options.

The final argument against competition and consumer sovereignty is that if parents are encouraged to make educational choices strictly in terms of private advantage, the cumulative result of these choices will be at odds with the general welfare. Unlike the two previous arguments, this one is in some ways persuasive. Creating a completely free market for schooling would almost certainly result in more segregation by race, income, and ability. It would also result in a redistribution of educational resources from disadvantaged to advantaged children. Taken together, these changes would probably leave students from low-income families further behind students from high income families than they are now. This increase in inequality would in turn tend to widen the gap and intensify conflict between racial groups, between economic groups, and between political interests.

But monopolistic control over educational choices is not the only way to avert these evils. Proponents of smog control, for example, argue that so long as the choice is left to individual consumers, not many auto purchasers will elect to pay for expensive exhaust systems whose benefits go largely to other people. But few proponents of smog control claim that the only alternative is to nationalize the automobile industry. Most simply urge legislation which forbids the sale of automobiles that pollute the air. Similarly, we can ensure integration and equitable resource allocation in education without having the state operate 90 per cent of the nation's schools. It would be perfectly possible to create a competitive market and then regulate it in such a way as to prevent segregation, ensure an equitable allocation of resources, and give every family a truly equal chance of getting what it wants from the system.

Criteria for Regulating the Educational Market

Those who want to give parents more voice in shaping their children's educational destinies can be found almost everywhere on the political and educational spectrum. Their objectives are almost as diverse as the objectives of education itself, and their proposals for breaking the present public monopoly therefore cover an extraordinary range of alternatives.

In recent years many advocates of competition and choice have united around a single slogan: "education vouchers." The idea of an education voucher is relatively simple. The government issues the voucher to parents. The parents take the voucher to the school of their choice. The school returns the vouchers to the government. The government then sends the school a check equal to the value of the vouchers. As a result, government subsidies for education go only to schools in which parents choose to enroll their children. Schools which cannot attract applicants go out of business.

Beyond this, however, differences of opinion begin. Who would be eligible for vouchers? How would their value be determined? Would parents be allowed to supplement the vouchers from their own funds? What requirements would schools have to meet before cashing vouchers? What arrangements would be made for the children whom no school wanted to educate? Would church schools be eligible? Would schools promoting unorthodox political views be eligible? Once the advocates of vouchers begin to answer such questions, it becomes clear that the catchphrase around which they have united stands not for a single panacea,but for a multitude of controversial programs, many of which have little in common.

These diverse voucher schemes can be viewed merely as different approaches to the regulation of the educational marketplace. Some schemes propose no regulation at all, counting on the "hidden hand" to ensure that the sum total of private choices promotes the public good. Others involve considerable economic regulation, aimed at offsetting differences in parental income and at providing schools with incentives to educate certain kinds of children. Still other schemes involve not only economic regulation, but administrative regulations aimed at ensuring that schools which receive public money do not discriminate against disadvantaged children. Finally, some schemes would establish extensive regulations to ensure that schools provided the public with usable information about what the school was trying to do and how well it was succeeding in doing it.

Chapters 2 and 3 of this report examine the problems of regulating a voucher system. Before the reader plunges into these details, however, he will probably find it useful to think rather carefully about the criteria that might be appropriate for evaluating various proposals. No two readers will have the same values about what education should be doing, and none will agree completely with the standards we have applied when evaluating alternative regulatory models. The next few pages therefore describe the assumptions and values which guided us in our evaluation, and which led us to choose the regulatory system described in the final section of this chapter.

In order to deserve support from the Office of Economic Opportunity, a voucher plan should have two objectives:

-- To improve the education of children, particularly disadvantaged children;

-- To give parents, and particularly disadvantaged parents, more control over the kind of education their children get.

These two objectives are not identical. For the most part we will assume that they are compatible, but this will not be true in every instance.

These broad generalizations require some elaboration. First it is important to decide whether "improving the education of the disadvantaged" means improvement relative to the education offered advantaged children today. We believe that, at least in education, closing the gap between the advantaged and the disadvantaged is of paramount importance. This conviction is central to our proposals for regulating the educational marketplace, so the reasons for it require explanation.

A generation ago the average American finished school with roughly eighth-grade reading competence, while the bottom quarter of the population was at about sixth-grade level. Mass circulation newspapers, being aimed at the "middle majority" of the population, also assumed something like eighth-grade reading competence. This meant that most people in the least competent quarter of the population could, with some difficulty and a bit of misunderstanding, follow a daily newspaper. Today the schools have boosted the average reading competence of people finishing school to the twelfth-grade level. They have boosted the average competence of the bottom quartile to the ninth-grade level. The gap getween the bottom quartile and the average for the population has thus widened. A comparison of today's mass circulation newspapers with yesterday's indicated that they too have raised their standards, using larger vocabularies and more complex prose than before. The net result could easily be that the least competent quarter of the population is less likely to read the same papers as the "middle majority." If this were in fact the case, the cultural, political, and social isolation of the bottom quarter would have increased, even though their absolute competence had risen.

Man is indeed a social creature. His capacity to do most of the things he cares about depends on his relationship to his fellow men. If he is less competent than they, he will find himself frustrated at every turn. If he is more competent than they, he will be in a good position to get what he wants from life. In a society of illiterates, a man who knows the alphabet is a scholar and a gentleman. In a society of college graduates, he is an illiterate. Translated into practical terms, this means that a man's satisfaction in life depends more on relative advantage than absolute attainment. We judge that this is particularly true in education. It follows that the well-being of American society depends less on its wealth, power, and knowledge than on the way these things are distributed among the population.

We recognize that many Americans reject this view. Nonetheless, if the upheavals of the 1960's have taught us anything, it should be that merely increasing the Gross National Product, the absolute level of government spending, and the mean level of educational attainment will not solve our basic economic, social, and political problems. These problems do not arise because the nation as a whole is poor or ignorant. They arise because the benefits of wealth, power, and knowledge have been unequally distributed and because many Americans believe that these inequalities are unjust. A program which seeks to improve education must therefore focus on inequality, attempting to close the gap between the disadvantaged and the advantaged.

Having said that regulatory machinery ought to help close the gap between the advantaged and the disadvantaged, we must also say something about how this might be done.

First, America must reallocate educational resources so as to expose "difficult" children to their full share of the bright, talented, sensitive teachers, instead of exposing them to less than their share, as at present. Merely equalizing expenditures will not suffice to achieve this. Teachers are human, and most of them instinctively prefer children who learn quickly and easily over children who learn slowly and painfully. In order to change these values, society must make working with disadvantaged children a prestigious and highly paid career. This means that if schools that enroll disadvantaged children are to get their share of able teachers, they must be able to pay substantially better salaries and provide substantially more amenities (e.g., smaller classes, more preparation time) than schools which serve advantaged children.

Second, America must alter enrollment patterns so that disadvantaged children have more advantaged classmates. A student's classmates are probably his most important single "resource," even though they do not appear in most calculations of per-pupil expenditure. Children learn an enormous amount (both for better and for worse) from one another. Equally important, a student's classmates determine how much, if anything, he will get from his teachers. If, for example, a disadvantaged child attends a school in which most children never learn algebra, his teachers will not expect him to learn algebra, even if he is perfectly capable of doing so.

All this implies that a competitive market is unlikely to help disadvantaged children unless it is regulated so as to:

- provide substantially more money to schools that enroll disadvantaged children than to schools which enroll only advantaged children; and
- prevent an increase in segregation by race, income, ability, and "desirable" behavior patterns.

The second general requirement of a regulatory system is that it give parents more control than they now have over the kind of education their children receive. We assume that increasing parents' sense of control over their environment and over their children's life chances is an end in itself both because it makes parents' lives less frustrating and because it makes them more effective advocates of their family's interest in non-educational areas.

Increasing parents' control over the kind of education their children receive should, however, also increase the chances that their children get a good education. The more control parents have over what happens to their children, the more responsible they are likely to feel for the results. This could easily make them take a more active role in educating their children at home. In addition, parents tend to care more than public servants about making sure that their child gets whatever he needs. The intensity of the typical parent's concern is, of course, often partially or entirely offset by his naivete about what would actually be good for his child or by his inability to get what he thinks the child needs. Nonetheless, we think that on the average parents are unlikely to make choices that are any worse than what their public schools now offer.

For parental choice to make a difference, however, genuine alternatives must really be available. "Good" education will always be in short supply, even if the parents are given money to buy it. Most (though not all) disadvantaged parents will want the same kinds of education as advantaged parents. When the two groups apply to the same "good" schools, disadvantaged children will not normally get their share of places. If disadvantaged parents are to feel that they also have control over the kinds of education their children receive, the market must be regulated in such a way that disadvantaged children have a fair chance of being admitted to the school of their choice.

The foregoing criteria do not exhaust the possible yardsticks for evaluating alternative regulatory systems. Before presenting our proposals it may therefore be useful to review the principal objections that others have raised to vouchers as a device for promoting competition and choice.

First, integrationists fear that vouchers would make it harder to achieve racial integration. This might result in a voucher system's being declared unconstitutional, as has already happened in four Southern states. Even if the system were not declared unconstitutional, it would be undesirable if it intensified rather than alleviated racial separation.

Second, civil libertarians fear that vouchers would break down the separation of church and state. Again, this might result in a voucher scheme's being declared unconstitutional. Even if it did not, it could unleash a series of bitter political struggles from which America has in the past been relatively exempt.

Third, egalitarians have emphasized that an unregulated market would increase the expenditures of the rich more than it increased those of the poor, exacerbating present resource inequalities instead of reducing them.

Fourth, public school men have feared that the public schools would become the "schools of last resort" and hence dumping grounds for students no other schools wanted.

Finally, some educators have argued that parents are not qualified to decide how their children should be educated and that giving parents a choice would encourage the growth of bad schools, not good ones.

The next sections show how these problems might be solved.

A Model Voucher System

In order to understand the proposals made in this report, the reader must begin by reconsidering traditional definitions of the terms "public" and "private" in education. Since the nineteenth century we have classified schools as "public" if they were owned and operated by a governmental body. We go right on calling colleges "public" even when they charge tuition that many people cannot afford. We also call academically exclusive high schools "public" when they have admissions requirements that only a handful of students can meet. And we call whole school systems "public" even though they refuse to give anyone information about what they are doing, how well they are doing it, and whether children are getting what their parents want. Conversely, we have always called schools "private" if they were owned and operated by private organizations. We have gone on calling these schools "private" even when, as sometimes happens, they are open to every applicant on a non-discriminatory basis, charge no tuition, and make whatever information they have about themselves available to anyone who asks.

Definitions of this kind conceal as much as they reveal, for they classify schools entirely in terms of who runs them, not how they are run. If we want to understand what is really going on in education, we might well reverse this emphasis. We would then call a school "public" if it were open to everyone on a non-discriminatory basis, if it charged no tuition, and if it provided full information about itself to anyone interested. Conversely, we would call any school "private" if it excluded applicants in a discriminatory way, charged tuition, or witheld information about itself. Admittedly, the question of who governs a school cannot be ignored entirely when categorizing the school, but it seems considerably less important than the question of how the school is governed.

Adopting this revised vocabulary, we propose a regulatory system with two underlying principles:

-- No public money should be used to support "private" schools.

-- Any group that starts a "public" school should be eligible for public subsidies.

Specifically, we propose an education voucher system which would work in the following manner:

1. An Educational Voucher Agency (EVA) would be established to administer the vouchers. Its governing board might be elected or appointed, but in either case it should be structured so as to represent minority as well as majority interests. The EVA might be an existing local board of education, or it might be a new agency with a larger or smaller geographic jurisdiction. The EVA would receive all federal, state, and local education funds for which children in the area were eligible. It would pay this money to schools only in return for vouchers. (In addition, it would pay parents for children's transportation costs to the school of their choice.)

2. The EVA would issue a voucher to every family in its district with school-age children. The value of the basic voucher would initially equal the per pupil expenditure of the public schools in the area. Schools which took children from families with below-average incomes would receive additional payments, on a scale that might, for example, make the maximum payment for the poorest child double the basic voucher.

3. In order to become an "approved voucher school," eligible to cash vouchers, a school would have to:

a. accept a voucher as full payment of tuition;

b. accept any applicant so long as it had vacant places;

c. if it had more applicants than places, fill at least half these places by picking applicants randomly and fill the other half in such a way as not to discriminate against ethnic minorities;

d. accept uniform standards established by the EVA regarding suspension and expulsion of students;

e. agree to make a wide variety of information about its facilities, teachers, program, and students available to the EVA and to the public;

f. maintain accounts of money received and disbursed in a form that would allow both parents and the EVA to determine whether a school operated by a board of education was getting the resources to which it was entitled on the basis of its vouchers, whether a school operated by a church was being used to subsidize other church activities, and whether a school operated by a profit-making corporation was siphoning off excessive amounts to the parent corporation;

g. meet existing state requirements for private schools regarding curriculum, staffing, and the like.

Control over policy in an approved voucher school might be vested in an existing local school board, a PTA, or any private group. No governmental restrictions would be placed on curriculum, staffing, and the like except those established for all private schools in a state.

4. Just as at present, the local board of education (which might or might not be the EVA) would be responsible for ensuring that there were enough places in publicly managed schools to accommodate every school-age child who did not want to attend a privately managed school. If a shortage of places developed for some reason, the board of education would have to open new schools or create more places in existing schools. (Alternatively, it might find ways to encourage privately managed schools to expand, presumably by getting the EVA to raise the value of the voucher.)

5. Every spring, each family would submit to the EVA the the name of the school to which it wanted to send each of its school-age children next fall. Any child already enrolled in a voucher school would be guaranteed a place, as would any sibling of a child enrolled in a voucher school. So long as it had room, a voucher school would be required to admit all students who listed it as a first choice. If it did not have room for all applicants, a school could fill half its places in whatever way it wanted, choosing among those who listed it as a first choice. It could not, however, select these applicants in such a way as to discriminate against racial minorities. It would then have to fill remaining places by a lottery among the remaining applicants. All schools with unfilled places would report these to the EVA. All families whose children had not been admitted to their first choice school would then choose an alternative school which still had vacancies. Vacancies would then be filled in the same manner as in the first round. This procedure would continue until every child had been admitted to a school.

6. Having enrolled their children in a school, parents would give their vouchers to the school. The school would send the vouchers to the EVA and would receive a check in return.

We believe that a system of the kind just described would avoid the dangers usually ascribed to a tuition voucher scheme.

-- It should increase the share of the nation's educational resources available to disadvantaged children.

-- It should produce at least as much mixing of blacks and whites, rich and poor, clever and dull, as the present system of public education.

-- It should ensure advantaged and disadvantaged parents the same chance of getting their children into the school of their choice.

-- It should provide parents (and the organizations which are likely to affect their decisions) whatever information they think they need to make intelligent choices among schools.

-- It should avoid conflict with both the Fourteenth Amendmend prohibition against racial discrimination and with First Amendment provisions regarding church and state.

The voucher system outlined above is quite different from other systems now being advocated. It regulates the educational marketplace more than most conservatives would like, and contains far more safeguards for the interests of disadvantaged children. We recognize that such restrictions will be considered undesirable by some people. But we believe that a voucher system which does not include these or equally effective safeguards would be worse than no voucher system at all. Indeed, an unregulated voucher system could be the most serious setback for the education of disadvantaged children in the history of the United States. A properly regulated system, on the other hand, could inaugurate a new era of innovation and reform in American schools.

2. Seven Alternative Economic Models

The merits of the voucher system for distribution of educational funds depend in part on how the value of the voucher is determined and how schools are allowed to raise additional funds beyond the value of their vouchers. All the plans discussed in this chapter resemble one another in that they guarantee every voucher school enough money to offer a program comparable in cost to what the public schools provide. They differ in their approach to the question of how (or whether) voucher schools might increase their incomes beyond this level.

We shall consider seven alternative education voucher plans, i.e., sets of ground rules for distributing money to voucher schools. As noted above, the plans resemble one another in that per pupil spending in the voucher schools would at least equal what was spent in the public schools in the district before the voucher plan went into effect. The plans, however, regulate schools' efforts to get extra money in different ways. The seven basic models are set forth in Table 1.

TABLE 1

Seven Alternative Education Voucher Plans

1. Unregulated Market Model: The value of the voucher is the same for each child. Schools are permitted to charge whatever additional tuition the traffic will bear.

2. Unregulated Compensatory Model: The value of the voucher is higher for poor children. Schools are permitted to charge whatever additional tuition they wish.

3. Compulsory Private Scholarship Model: Schools may charge as much tuition as they like, provided they give scholarships to those children unable to pay full tuition. Eligibility and size of scholarships are determined by the EVA, which establishes a formula showing how much families with certain incomes can be charged.

4. The Effort Voucher: This model establishes several different possible levels of per pupil expenditure and allows a school to choose its own level. Parents who choose high expenditure schools are then charged more tuition (or tax) than parents who choose low-expenditure schools. Tuition (or tax) is also related to income, in theory the "effort" demanded of a low-income family attending a high-expenditure school is the same as the "effort" demanded of a high-income family in the same school.

5. "Egalitarian" Model: The value of the voucher is the same for each child. No school is permitted to charge any additional tuition.

6. Achievement Model: The value of the voucher is based on the progress made by the child during the year.

7. Regulated Compensatory Model: Schools may not charge tuition beyond the value of the voucher. They may "earn" extra funds by accepting children from poor families or educationally disadvantaged children. (A variant of this model permits privately managed voucher schools to charge affluent families according to their ability to pay.)

We will make several basic assumptions about the economic context in which any voucher system should operate:

-- We will assume that the level of tax support for education usually would rise at about the same rate under a voucher system as it has under the present system. Where this assumption is unjustified it will be discussed in connection with a specific plan. In general, however, it seems wisest to assume that the basic level of the voucher would be roughly comparable to what the public schools are now spending per pupil. Some models would augment the basic voucher by making special payments for disadvantaged children. Since expenditures on middle-class children are unlikely to decline, these special payments for the disadvantaged would increase overall expenditures, at least in the short run.

-- We will assume that the sources of tax support for education would change in much the same way under a voucher system as under the present system. We anticipate a gradual increase in the federal share of education spending, and a gradual decline in the local share. Some federal share would indeed probably be essential if the vouchers for disadvantaged children were to be set higher than the norm for all children, because only the federal government seems to have the capacity to provide such supplements on a large scale.

-- We will confine our discussion to "comprehensive" voucher systems in which the amount of public money going to any given school, whether publicly or privately managed, is almost entirely determined by the value of the vouchers it receives. This could be achieved in one of two ways:

1. A local board of education might become the EVA for its area. It would then receive the federal, state and local funds to which the local public schools had traditionally been entitled, plus whatever additional funds were available. It would disburse all its money in the form of vouchers. A variety of complex accounting arrangements must be required to ensure that certain funds

went only to public schools, but the net effect would be to make overall tax support for each voucher school in the area a function of the number and kinds of pupils it enrolled, not whether it was publicly or privately managed.

2. The EVA might be independent of the local board of education. The local board of education would continue to operate schools in its area. The EVA would make payments to the local board for the vouchers it collected from parents in the same way that it would make payments to private groups. Ideally the EVA would become the sole recipient of tax funds for education. If however, it were politically necessary, a local board could continue to receive some direct support from the local property tax. The EVA would have to ensure that these funds did not give publicly managed schools an unfair competitive advantage over privately managed schools. In order to do this, the EVA could simply require that when a local board of education submitted its children's vouchers for payment, it also reported its receipts from local tax funds. The EVA could then deduct these direct payments from the check it sent to a local board for its vouchers. This approach would eliminate local incentives to boost property taxes, however. Instead of deducting the public schools' local property tax receipts from its voucher payments, therefore, the EVA might make the overall value of vouchers in an area a function of local property taxes. The EVA could do this if it had federal or state money to augment the value of private schools' vouchers by the same amount that local taxpayers voted for public schools. If taxpayers voted an increase in local property taxes, expenditures in all voucher schools would increase. A voucher would thus end up having two parts, one of which was determined by local taxpayers, and one of which was determined by federal and/or state legislators. This would, of course, be similar to the current situation.

In addition to these assumptions there are certain economic issues which arise under any voucher system but which do not affect the relative merits of alternative systems. These include the following:

-- Some existing federal and state aid programs might be subsumed into the voucher program. The purpose of Title I of the Elementary and Secondary Education Act, for example, might well be achieved by using Title I funds to augment the value of voucher payments for low-income children. Similarly, special programs for the handicapped might take the form of augmenting these children's vouchers.

-- In order to encourage diversity, a voucher system ought to help new schools to get started. One way to do this would be to establish a loan fund that would lend schools money at low interest rates. A loan fund of this kind ought if possible to be large enough to help publicly, as well as privately, managed schools deal with capital costs.

-- In order to ensure genuine choice, a voucher system would have to enable parents to send their children to schools that were beyond walking distance from their homes. This means that a voucher system must pay transportation costs for children who attend schools outside their neighborhoods. Such payments should be added to the basic voucher, and should go directly to parents. It is not desirable to make transportation costs part of the basic voucher, since this has the effect of penalizing a school economically for enrolling children from outside its immediate neighborhood.

-- Assuming they are held constitutional, payments to church schools would be roughly comparable to payments to other schools. It might be desirable for legal reasons to make payments to church schools somewhat smaller (80 percent?) than payments to secular schools, and to require that churches contribute the balance to cover the cost of religious instruction. The impact of such a policy on the overall level of school expenditures would be negligible. The legal implications of the First Amendment are discussed in more detail in Appendix A.

-- We assume that vouchers would be tax exempt.

We will apply four basic criteria to each model:

1. What would the model do to school expenditures? This question has two parts:

-- How would the model affect private expenditures?

-- How would it affect public expenditures?

The overall effect of a model on school expenditures involves a calculation of trade-offs between the two.

2. How would the model affect the allocation of school resources among different kinds of pupils? Again, this question has two parts:

-- Would the new pattern of resource allocation be more or less efficient, i.e., would it increase or decrease overall school input.

-- Would the new pattern be more or less equitable, i.e., would it benefit the currently advantaged more or less than the currently disadvantaged?

3. Would parents who are dissatisfied with the education currently available to them be able to choose an option they preferred under the proposed model? This question has three variants:

-- To what extent would parents who are dissatisfied with the level of resources now devoted to their child's education be able to enroll their children in schools with more resources?

-- To what extent would parents who are unhappy about the racial, socio-economic, academic, or cultural mix of pupils in their children's present school be able to enroll their children in schools that had different mixes of pupils?

-- To what extent would parents who are unhappy about the philosophy and style of education in their children's present schools be able to enroll their children in schools which were more to their taste?

4. How would various political interest groups, and especially the public school system, react to the proposed scheme?

We pay more attention to some of these criteria than to others. In part this is because certain criteria are extraordinarily difficult to apply. The reader will discover, for example, that we make few firm predictions about the overall effect of any model on the tax rate. This reflects the fact that a firm prediction would require not just an enumeration of the various factors that would push tax rates up or down, but an estimate of the relative magnitude of these factors. Similarly, we have said almost nothing about the effect of reallocating educational resources on the overall level of school output. Once again, the reason is that educational research has turned up no solid evidence about the relationship between school resources and the outcomes of schooling. There is even less basis for estimating the marginal return to investment in the education of different kinds of students. Lacking such evidence, we cannot say whether the nation's overall level of intellectual or social competence would be higher if we allocated additional resources to students who already do fairly well with the resources they have or to students who do relatively badly.

It would, however, be disingenuous to pretend that technical difficulties were the only reason for our putting more emphasis on some criteria than others. We think some criteria more important than others, and we think some outcomes of a voucher plan desirable while others are undesirable.

The impact of any given economic model on the overall character of the educational system will also depend in part on the ground rules regulating the recruitment, admission, and expulsion of students to various kinds of voucher schools. In Chapter 3 therefore we propose ground rules which would treat publicly and privately managed schools in precisely the same way, and which would prevent any school from discriminating against disadvantaged applicants. Most other advocates of education vouchers have proposed less regulation of the admissions process. Many have assumed that privately managed voucher schools would be free to take the most easily educated students, leaving the hard-to-educate students for the public schools. Economic models which look quite satisfactory if admissions procedures are closely regulated often look far less satisfactory if schools are given more leeway to pick and choose among applicants. The reader should keep this problem in mind when looking at the alternatives.

1. Unregulated Market Model

Perhaps the simplest and certainly the commonest proposal for vouchers is to provide every child with a flat grant or tax credit which his family could use to pay tuition at the school of its choice. The amount of the grant would be determined by legislators, but most advocates of the plan assume that the grant would be roughly equal to the present level of expenditure in the public schools. Most advocates also assume that public schools would continue to exist, and that they would charge tuition equal to the amount of the grant. This is the version of vouchers advocated by Milton Friedman and others.[1]

The effect of a free market on the level of taxation is unpredictable. The initial effect would be to raise the tax rate, since the taxpayers would have to pay for children now being educated at private expense. Nationally, this would increase the tax burden about ten percent, but the jump would be much sharper in some areas. This increase may, of course, take place whether or not a voucher system is established. If public money is not made available to Catholic schools, many of them are likely to close in the next few years. Their pupils will enroll in the public schools, pushing up public expenditures in precisely the same way that a voucher system would.

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[1] See Milton Friedman, Capitalism and Freedom, N.Y. 1962. Chapter 6.

Since a voucher system would allow more parents to benefit from public expenditures for education, it probably would lead to broader political support for such expenditures. Under present arrangements, parents with children in private schools are seldom enthusiastic about higher taxes for support of public education. If their children were likely to benefit from such taxes, their attitude would perhaps change. This might push public expenditures up over the long run.

An unregulated voucher system would, however, set in motion other forces that might work against increased public expenditures. If affluent taxpayers took a consistent, long-run view of their self-interest, they would presumably try to keep the level of voucher payments low and finance their children's education from private supplementation. This would spare them the necessity of subsidizing the education of poor children. If affluent taxpayers all reacted in this way, the result would probably be a powerful political bloc dedicated to holding down the value of the vouchers.

Affluent taxpayers may, however, not take a consistent, long-run view of their interests. Instead, the primary conflict of interest at any given moment may be between those people who have or expect to have children in school, and those who do not. If a family, however well-off, has several children in school, higher vouchers would almost always serve its immediate interest. Conversely, if a family has no children in school, vouchers of a high value would never serve its interest, no matter what its income.

If the primary conflict of interest turned out to be between "parents" of all incomes and "non-parents" of all incomes, there could easily be more effective pressure to increase tax subsidies for education than at present. The number and character of the families that gained or lost from raising school taxes would remain much as at present, except that families who now have their children in private schools would acquire an interest in increasing rather than limiting public subsidies. But affluent parents with school-age children would have more interest in raising the level of public subsidies than at present. Today, the parent with a child in public school usually favors "better schools," but his interest in higher expenditures is often tempered by his doubts that higher spending is really going to benefit his children as much as educators claim. But if a parent had enrolled his child in a school that charged tuition in addition to the value of the basic voucher, he would view proposals for increasing the size of the voucher as a way of reducing his current out-of-pocket expenses. The reduction in his private spending would exceed the increase in his taxes so long as he had children in school. Direct help of this kind is likely to generate considerable enthusiasm.

All in all, the effect of an unregulated market on tax levels would probably depend on the relative importance to affluent parents of their long-term interest as tax-payers and their short-term interest as parents. This is hard to predict. Still, it is quite possible that the voucher would gradually lag further and further behind total expenditures per pupil.

The effect of an unregulated market on overall expenditures for education would depend mainly on its effect on tax support for education. An unregulated market would probably increase private contributions to the cost of education. While some parents who now pay the full cost of private schooling would get partial or full subsidies, many parents who now get full subsidies would probably start supplementing their vouchers with private money. The increase in private expenditures could, however, easily be offset by a relative or absolute decline in public expenditures. Whether overall expenditure levels would increase or decrease is thus unclear.

A scheme of this kind would result in a reallocation of educational resources so that a smaller percentage went to the poor and a larger percentage to the well off. Families of varying income would all receive the same subsidy. This would increase slightly the share of public expenditures on education going to the poor, since current public expenditure patterns show a moderate bias in favor of schools with middle-class pupils. But this redistribution of public funds would be more than offset by the capacity of affluent families to pay substantial additional tuition. Admittedly, many schools would make an effort to provide scholarships for poor applicants, but it would be unreasonable to expect that any significant number of poor children would attend these expensive schools on scholarships. An applicant who can pay full tuition will almost certainly have a better chance of going to most private schools than an applicant who requires a subsidy.

An unregulated market would shift the decision about how much to spend on education from local school boards to families but only to affluent families, not poor ones. If large numbers of affluent families chose to spend more, an unregulated market would lead to increasing segregation along economic lines. Indeed, this is one reason many middle-class families favor voucher plans. They want to send their children to school with other middle-or upper-middle-class children, and they see vouchers as an easy and apparently legitimate way to do this.

Some have argued that resource reallocation is of limited importance so long as the basic voucher is high enough to provide an adequate educational program for everyone. This is a naive view of the educational process. First, as we have seen, an unregulated market offers no assurance that the basic voucher could be kept high; it might well tend to decline relative to the overall price of education. Second, even if the basic voucher remained high, the absolute level of expenditure in a school does not determine the resources it can command. Rather the critical question is often how the school's resources compare with its competitors' resources. Suppose, for example, that schools attended by poor children were to double their teachers' salaries over the next five years. Suppose that schools attended by middle-class children tripled their salaries over the same period. The quality of the teachers in schools attended by poor children would probably decline under these circumstances. It follows that the quality of education provided by a school does not depend simply on its per pupil expenditure,but also on how this expenditure compares with that in competing schools. In addition, if segregation increases, the relative cost of providing a given service to disadvantaged schools will increase, while in an advantaged school its relative cost will decline. We conclude, then, that no politically practical level of basic payments will assure quality education for the disadvantaged so long as other schools can spend more and can exclude the disadvantaged.

Within this context, an unregulated market could give upper-income families an almost unlimited range of potential program options. Low-income families would have a more restricted range of choices, since (a) they could not afford any program that cost more to operate than the value of their voucher, and (b) they could not generally hope to find a school where the majority of their child's classmates were from other than low-income families.

An unregulated market is likely to commend itself to middle-and upper-income families and to existing independent and parochial schools. It may also commend itself to certain low-income black groups who are interested in starting their own schools and cannot seriously believe that anything could be worse for their children than the existing public schools. The plan would be opposed by the public schools. Elimination of middle-class children from the public schools would make the lives of public school men even more difficult than at present. It might lead to a reduction in the public schools' financial resources and it could certainly lead to a reduction in the quality of teachers available in the public schools.

Our overall judgement is that an unregulated market would redistribute resources away from the poor and toward the rich, would increase economic segregation in the schools, and would exacerbate the problems of existing public schools without offering them any offsetting advantages. For these reasons we think it would be worse than the present system of public schools.

2. Unregulated Compensatory Model

In order to protect the poor against an unregulated marketplace, some advocates of vouchers have proposed making the value of vouchers higher for children from low-income families.

Theodore Sizer and Phillip Whitten have proposed one version of this plan.[2] Families with incomes below $2,000 would receive $1,500 vouchers. The value of the voucher would decline to zero as the family's income approached the national average. Families with incomes above the national average would receive no subsidy. Sizer and Whitten clearly do not envisage this plan as an alternative to the present system, but rather as a supplement to it. They do not explain whether a child who stayed in an existing public school would bring that school the full value of his voucher, or whether he would only bring the difference between his voucher and what the public school was already receiving from other public sources for the student. Were publicly controlled schools to receive the voucher in addition to other public monies, it would be extraordinarily difficult for privately controlled schools to compete. We will therefore assume that the value of the voucher would be reduced by the amount of current tax subsidy to any given school, putting publicly and privately controlled schools on the same footing.

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[2] Sizer, Theodore, and Whitten, Phillip, "A Proposal for a Poor Children's Bill of Rights," Psychology Today, August, 1968.

If this were done, the Sizer proposal would have the effect of giving the poor some opportunity to buy their way into privately controlled schools, just as the rich now do. It would not give the middle classes such an opportunity, since they would receive little or no subsidy and would not be able to pay $1,000 or $1,500 tuition from their own resources. A scheme of this kind would almost certainly be rejected out of hand by legislators.

To make the plan politically acceptable, it would be necessary to enable all parents to send their children to privately controlled schools if they chose. The simplest way of doing this while preserving the basic features of the Sizer proposal seems to be to establish a system rather like the one we proposed in Chapter 1. Each child would receive a basic voucher of $750, regardless of family income. Schools taking children from families with incomes below the national average would receive additional payments. Unlike the model proposed in Chapter 1, however, this model would allow schools to charge tuition in addition to the voucher, at whatever level they saw fit. Since few of the regulations on admissions policies proposed in Chapter 1 would be workable if students had to pay tuition, we will assume that privately controlled schools could select their students in any way they wanted, while the public system would have to provide spaces for anyone the privately controlled schools did not accept.

In order to appraise the likely effects of the unregulated compensatory model, we must first estimate the likely effect of the system on the overall purchasing power of various income groups. Overall purchasing power will be the sum of the voucher provided by the EVA, (which would decline as income increased) and private tuition payments (which would tend to increase as income increased). As one moves up the income scale, the value of the voucher might decline faster, slower, or at the same rate that private contributions increased.

If education is sold on the open market, like housing or food, legislators are likely to take their usual attitude toward subsidizing the poor. Low-income families may be given somewhat larger vouchers than middle-income families, but the difference is unlikely to be as large as the difference in private purchasing power between low- and middle-income families. Food stamps, for example, help equalize the purchasing power of rich and poor in a grocery store, but not enough to ensure that the poor eat as well as the rich. The same pattern is repeated in housing, where the poor are sometimes given modest subsidies, but never enough to outbid the wealthy. So too in education, legislatures may provide poor parents with slightly larger vouchers than rich parents, but (as the legislation discussed in Chapter 4 illustrates) the difference is not likely to compensate the poor for their inability to spend private funds on education.

If legislatures behave as they have in the past, then, the "compensatory" features of this model would be of limited importance. Well-to-do families would be able to spend far more on their children's education than poor families. The effects of a compensatory free market model would therefore be similar to those of a completely unregulated market. There would be differences in the degree to which the two models promoted segregation and the degree to which they widened the gap between rich and poor, but the basic pattern would be the same.

Suppose, however, that a legislative body chose to establish a compensatory voucher system which actually equalized the average purchasing power of families in different income groups. In order to do this, it would need empirical data on the willingness of families at various income levels to spend their own money for private tuition. The result of such studies would vary dramatically, according to what the family would actually buy for different prices, which would in turn depend on local market conditions at the time. Nonetheless, let us suppose that a formula were developed for predicting the average private contribution that a family with any given income will make from its own funds. Let us also suppose that a legislature fixed the value of the voucher so as to bring each income group's average purchasing power up to some specified level, say $1,000.

This would have a serious impact on the continued political acceptability of the plan. Suppose, for example, that families with $5,000 annual incomes were found to spend an average of $50 per child on tuition and therefore received vouchers worth $950 per child. Some of these families might be willing to spend as much as $100 of their own money to get their child into a better school, while other families might not be willing to spend anything. The overall difference in purchasing power between the most and least motivated parents in this bracket would still be only $100. This means that most schools which were open to one $5,000 family would also be open to the other. Now suppose the average contribution of a family with $15,000 is found to be $500 per child, entitling it to a $500 voucher. Under these circumstances some $15,000 families might be willing to spend only $250 per child of their own money, while others might be willing to spend another $1,000 per child. The net effect would be that the most motivated parents had $1,500 per child, while the least motivated had $750. This would mean that some children of the well-to-do would not be in schools as expensive as their indigent neighbors, while others would be in more expensive schools.

This picture actually seems somewhat far-fetched, however. If legislation were designed to ensure that every family could end up with $1,000 per child by making "reasonable" effort, almost all schools would probably set their tuition at or near $1,000. Every family would then have to spend this much in order to get its children into a satisfactory school. Since the bulk of these payments would be coming from middle-income families, it seems reasonable to anticipate continuing pressure from these families for increases in the value of their vouchers. The effect over time would probably be to eliminate the differential between vouchers paid to middle-and lower-income families. Once again, then, what began as an unregulated compensatory plan would probably end up as a completely unregulated plan, in which almost all parents received roughly equal payments and were free to supplement them from their own funds. We have already analyzed the consequences of such a plan in the previous section.

3. Compulsory Private Scholarship Model

The Compulsory Scholarship model resembles the unregulated market in that schools would be allowed to charge whatever tuition they wished. But they would also be required to provide enough scholarships so that no applicant's family had to pay more than it could afford. Several well-endowed private schools follow this policy, as do a number of wealthy private colleges. The colleges calculate parents' ability to pay from formulae developed by the College Scholarship Service. They then guarantee every successful applicant enough financial aid from one source or another so that he can pay tuition, room, and board without getting any more help from home than required by the CSS formula.

If a scheme like this were adopted as public policy, legislative bodies would presumably establish formulae equivalent to those of the CSS. In theory, any public or private voucher school would apply these formulae to raise additional funds from its more affluent parents. If this money were allocated evenly to all sorts of pupils, the effect would be to "overcharge" the rich and "undercharge" the poor, relative to costs. There are, however, a number of practical difficulties which make it unlikely that the actual effects of this plan would differ appreciably from the effects of an unregulated market.

The basic problem is that all schools want to increase their incomes. If the basic voucher is fixed, and if the permissible level of tuition depends on a family's income, then the only way to increase the school's income is to admit richer students. If schools are required to admit a random sample of applicants, they will develop programs and recruitment policies which appeal mainly to applicants from appropriate economic backgrounds. If all else fails, schools may set higher academic standards for "scholarship" than for "non-scholarship" students after admission, encouraging mediocre students to withdraw if they are getting financial aid and to stay if they are not.

The foregoing analysis suggests that it is impractical to require voucher schools to subsidize needy applicants from their own funds. All schools feel they need more resources than they have. If they are allowed to charge tuition based on ability to pay, most schools will decide that they need a fairly affluent student body to provide these resources. And if that is what they want, most schools will be able to get it. The "compulsory" private scholarship model is thus likely to end up almost indistinguishable from a "voluntary" private scholarship model, i.e., the unregulated market.

4. The Effort Voucher

While it seems to be impractical to force schools to subsidize needy students from their own receipts, it might be possible to establish a system in which the EVA did so. At first glance the simplest way to do this is for each family to pay what it can afford, based on some official formula, and for the EVA to pay the rest. The difficulty with this is that if a family's liability for tuition depends exclusively on its income and not at all on what the school spends, the market no longer puts any check on school expenditures. Schools will raise tuition higher and higher in an effort to improve their programs, but parents will pay a fixed amount of tuition based on their income. The rising cost of education will therefore be absorbed entirely from the public treasury. At this point legislators will almost certainly intervene and put upper limits on what tuition a school can charge.

The most practical approach to this problem is probably the one outlined by John Coons and his associates.[3] The Coons' model gives every school a choice between four different levels of expenditure, ranging from roughly the present public school level to 2-3 times that level. Schools at the lowest level would be almost completely subsidized by the state, although at each level parents are expected to pay at least a token charge. The size of their contribution would depend *both* on the family's ability to pay *and* on the cost of the school the family chose. The government would contribute the difference between what a family paid and what the school spent per pupil.

Coons assumes that the charges for attending expensive schools, while only covering part of these schools' extra costs, would keep the overall tax burden under control by keeping the number of applicants moderate. Affluent families would be charged more for attending expensive schools than these schools actually cost. If, for example, schools were allowed to spend no more than $1,500, some families might nonetheless pay $2,000 or more to send their children there. The model could, however, also limit costs for affluent families to the level of expenditure in the school of their choice. Such a maximum might make the model more politically acceptable.

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[3] Coons, John; Clune, William;and Sugarman, Steven; *Private Wealth and Public Education,* Harvard University Press, May 1970. Coons and his associates have developed a model statute for California.

Coons' model seeks to allocate educational resources on the basis of parental "willingness" to pay rather than "ability" to pay. Ideally, then, schools operating at any given expenditure level would attract an economically representative student body. Schools demanding different levels of economic sacrifice would, however, attract students from very different cultural backgrounds. Schools which demanded economic sacrifices for education would attract families in which the parents were better educated than the norm for their income group, more likely to hold regular jobs, and more likely to be doing non-manual work. The values and atmosphere of these children's homes would usually support the values and atmosphere of the school, and the children would mostly be diligent, disciplined, and easy to teach. Schools which demanded lighter economic sacrifices and provided a lower level of resources would attract the opposite sorts of families.

Evaluating this proposal in terms of the criteria outlined at the beginning of this chapter, we conclude that:

-- The model's impact on the tax rate is problematic. The average tax subsidy per pupil would probably rise, but this would depend on the formulae adopted to ensure "equality of sacrifice." The model is designed to increase overall education expenditures, and it would probably succeed.

-- The model would redistribute resources away from children whose parents had relatively little interest in education and toward children whose parents had an intense interest in education. The effect of this would be to accentuate the advantage already enjoyed by children whose parents are willing to make sacrifices in the children's behalf, and to accentuate the disadvantage of children whose parents are not willing to make such sacrifices.

Whether the model would redistribute resources between rich and poor families would depend on the precise formula adopted. Coons argues that a formula could be developed which made the cost of attending a high-expenditure school so great that many upper-income families would not take this option. He believes, indeed, that the correlation between school expenditures and family income could be kept at zero. If so, this would thus represent a modest improvement over the status quo.

-- The model would allow parents considerable latitude in determining how much they wanted spent on their children's education. In this respect it is superior both to the present system for financing public education and to the other voucher models discussed in this chapter.

-- The model might well reduce the amount of segregation by race and income. It would presumably increase the amount of segregation by ability and behavior patterns. It would thus give some parents more choice about the race and socio-economic background of their children's classmates. It would ration the supply of able, well-behaved classmates by charging families more if they sent their children to schools with "advantaged" student bodies. This charge would, however, supposedly be related to ability to pay.

-- The model would allow parents a wide variety of program options, including options of varying cost.

-- The model would almost certainly be unpopular with publicly controlled schools. This is because publicly controlled schools would still be politically constrained to operate at the lowest expenditure level allowed in the model. The public schools would thus find themselves both with the children whose parents were least willing to make sacrifices for education and with the least adequate resources.

Overall, our conclusion is that while the effort voucher would lead to a substantial increase in parental choice, it would also lead to a much greater spread between the "best" and the "worst" schools than exists within most public school systems today. This would exacerbate inequalities in the outcomes of schooling, insofar as these outcomes are at all influenced by the quality of schools. Politically, the model may be attractive because it would give interested parents a better chance of getting what they want. Children with uninterested parents, on the other hand, would be much worse off than today, first because they would go to schools with less resources, and second because they would have more disadvantaged classmates. While a system like this might be popular in the short run, its long-term effect on the next generation seems to us undesirable.

5. "Egalitarian" Model

What we have called the "Egalitarian" approach to vouchers would provide vouchers of equal value to all children and would prohibit any school which cashed the vouchers from charging tuition beyond the value of the voucher. It seems reasonable to assume that the value of vouchers would resemble the present and projected levels of per pupil expenditure in public schools.

Both publicly and privately managed schools would, of course, be able to solicit money for special programs from federal and state agencies and from foundations. Privately managed schools might also be able to obtain money from their church if they were affiliated with one, from rich alumni if they had any, and from rich parents of children in the school if there were any.[4] Both publicly and privately controlled schools could, of course, also obtain the additional funds by working together to persuade legislators to increase the value of the vouchers.

An Egalitarian voucher would tend to equalize the allocation of educational expenditures among children from different income groups. It might not eliminate disparities between districts, but it would equalize expenditures within districts. Since most studies of resource allocations within districts indicate that rich children get slightly more than their share of the money, while poor children get slightly less, the Egalitarian model would produce a small improvement over the status quo in this respect.

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[4] The possibility of obtaining contributions from rich parents and alumni would presumably make schools somewhat more favorable to applications from such pupils than to applications from the less affluent. So long as contributions remained voluntary,however, the experience of existing private schools and colleges suggests that wealth would have a significant effect on admissions policy only when the size of the anticipated contribution was very large. Existing private schools and colleges do not appear to be influenced by the fact that Parent A could be expected to contribute $200 to the building fund whereas Parent B can not be expected to contribute more than $20. They do appear to be influenced by the fact that Parent C can be expected to contribute $20,000 to the building fund whereas Parents A and B can only be expected to contribute $200 and $20 respectively. The number of parents sufficiently rich to influence admissions decisions through potential capital contributions is small. We doubt that any politically practicable system can be devised for offsetting the advantage of being born with such parents. The bureaucratic machinery and regulations needed to eliminate this injustice would almost certainly cause more problems that it would solve.

It does not follow, however, that the Egalitarian voucher would actually equalize the allocation of educational resources, as distinct from educational expenditures. There is considerable evidence that it costs more to provide a given resource to a poor child than to a middle-class child. Teachers, for example, often prefer to teach middle-class children, and many will accept a job with such children at a lower salary than they would accept if they were going to have to teach lower-class children. Similarly, physical resources seem to last longer in middle-class than lower-class schools. This means that equal expenditures do not ensure equal resources; on the contrary, equal expenditures probably ensure unequal resources.

The Egalitarian voucher would not change the locus of control over educational expenditures. The basic level of expenditure would still be determined by a combination of federal, state, and local legislators. Individual parents and small voluntary groupings of parents would still have relatively little influence on expenditure levels.

The effect of an Egalitarian voucher on parental ability to choose a school with a desirable mix of pupils would depend on the extent to which schools were allowed to exercise discretion in selecting among applications. If schools received exactly the same amount of money per pupil, they would in most instances want to recruit and admit those pupils who cost least to educate. School administrators also know they can get better teachers and make their resources stretch further if they can recruit talented, well-behaved students than if they cannot. A school administrator's most rational strategy, given limited fiscal resources, would therefore be to make his school as exclusive as possible. Exclusion would, however, tend to be based more on the characteristics of students and less on the characteristics of parents than in the models discussed up to this point.

Were this to happen, parents with talented and well-behaved children would clearly have more choice than they now do about the mix of pupils to whom their children would be exposed. Parents with children who have trouble in school would have relatively little choice, since they would be excluded from over-applied schools, both public and private. This would be less sure if strict regulations were put on discriminatory admissions policies, but even then the pattern would persist to some extent. Parents with talented, well-behaved children are not, however, always advantaged economically. It is not easy to tell whether a system that promoted segregation along academic and behavioral lines would give low-income families more or less choice than the present system of neighborhood assignments.

Within the limitations imposed by equalization of per pupil expenditure, the Egalitarian voucher would shift the locus of control over school programs away from the local board of education to a combination of parents and semi-public schools. It seems clear, for example, that an Egalitarian voucher would encourage the survival and growth of Catholic schools. It would also encourage the growth of all-white schools unless administrative and constitutional prohibitions against discriminatory admission policies were energetically enforced.

It is important to emphasize, however, that an Egalitarian voucher scheme would not provide unlimited program options, because it would not provide enough money to do what many parents and educators think necessary. Existing independent, non-parochial schools almost all spend more money per pupil than do the public schools. Since most of these schools have no significant source of revenue other than tuition, accepting all voucher students would mean cutting their expenditures to about the same level as the public schools. Such a cut would mean abandoning what most independent schools regard as their most important asset, namely their high ratio of staff to students.[5] Most independent schools would probably accept only a limited number of voucher students. (If, as we propose in Chapter 3, cashing vouchers was contingent on a non-discriminatory admissions policy, most independent schools would probably decline to take _any_ voucher students.)

While the refusal of independent schools to accept vouchers is not in itself a problem, it does suggest that the Egalitarian voucher fails to satisfy the interests of one group of parents who are now acutely unhappy with the public schools. These are parents whose fundamental complaint is that spending on public education is too low. Such parents complain that public school facilities are inadequate, that classes are too large, and that children receive insufficient personal attention in the public schools. There is no way to solve these problems without spending more money, and an Egalitarian voucher does not offer parents this option. Such parents' only recourse under an Egalitarian voucher scheme would be the same as at present: enroll in a private school at one's own expense, or move to a district which supports education more generously.

If we assume that relatively few independent schools would choose to become voucher schools under an Egalitarian voucher scheme, we must ask whether any appreciable number of _new_ voucher schools would be established. The answer to this question is not obvious. We suspect that most of the upper-middle class parents who patronize existing independent schools want a brand of education which requires substantially more resources than the electorate is willing to vote for public education. Such parents would probably not be much interested in creating voucher schools that had to stay within the budget limitations established by taxpayers.

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[5] Independent schools almost all have smaller classes and hence spend more money per pupil for teachers' salaries than do the public schools. Teachers' salaries in private schools are generally lower than in public schools, because many teachers are willing to take lower salaries in return for smaller classes and other advantages. The expenditure _per pupil_ on teachers' salaries nonetheless usually exceeds public school expenditure.

But not all dissatisfied parents are preoccupied with the level of resources available for their children. Some are dissatisfied with the way in which these resources are used. Many black parents seem to fall into this category, in that their primary demand is for schools they can call "ours" rather than "theirs." A number of business firms have also shown interest in trying to operate schools at roughly the same cost as the public schools. Some claim that innovative staffing and instructional patterns could achieve considerably more at about the same cost as the present public system. There is no way to determine whether this claim is really accurate except by letting them try.

If an Egalitarian voucher appealed mainly to Catholics interested in parochial schools and blacks interested in black-controlled schools, it would probably not have a major disruptive effect on the existing public schools. Nor would it necessarily arouse intense political opposition from school boards and school administrators. If public school men were assured that privately managed schools would (a) have to operate on more or less the same budget as the public schools, and (b) have to take their share of "hard to educate" children, they might well expect to hold their own in competition with these schools. Public school systems in cities with large black populations might reasonably anticipate the departure of substantial numbers of black children to privately managed schools, but if this exodus reduced the political turmoil now engulfing public education, many public school men might think it a net gain. Public school opposition to vouchers usually derives from fear of a massive exodus of the middle-class students. An Egalitarian voucher scheme would probably not have this effect.

Taking all these observations together, we reach the following conclusions:

-- The Egalitarian model would produce less segregation by race, income, and ability than any of the unregulated models. But unless stringent restrictions were placed on the right of over-applied schools to select their own students, the Egalitarian model would still produce more segregation by ability than most existing public school systems.

-- The Egalitarian model would result in a much more equitable allocation of educational resources between rich and poor than the unregulated models. But because it would probably increase segregation by ability, the Egalitarian model would also increase cost differentials for many resources. As a result, it might produce a less equitable distribution of actual resources between rich and poor children than the present system, and it would almost certainly produce a less equitable allocation of resources between quick and slow learners.

-- The Egalitarian model would do less than the unregulated models for parents who dislike the existing public school system because the public schools devote inadequate resources to their children. On the other hand, the Egalitarian model would provide more satisfaction than the present system to those parents whose complaints have to do with the way schools are run rather than the resources at their command.

6. Achievement Model

All of the foregoing models assume that the value of a voucher is determined by the characteristics of the family or the child receiving it. There is another possible approach, however, under which the value of a voucher is determined not by how much the school "needs" to educate the child, nor by how much the parents "want to spend" on the child, but by whether the school actually succeeds in teaching the child what the state (or the parent) wants taught. This approach, traditionally known as "payment for results," has recently been revived by a number of business firms. Such firms have sought (and in several cases received) contracts with school boards. Under these contracts the firm teachers specified subjects to certain children and is paid more if the children then do unusually well on some standard achievement test.

The basic assumption behind this model is that society can measure the effects of schooling and that we should therefore reward schools which produce good effects while penalizing schools which produce bad effects. We do not accept this assumption We do not believe that it is possible to measure the most important effects of schooling, and we do not believe it is desirable to reward schools for producing relatively unimportant effects.

The only reliable measures of elementary schools' effects are standardized cognitive tests. These measure such things as vocabulary, reading comprehension, arithmetic skills, and so forth.

Attitude measures are not generally thought to be very reliable at this age level and their validity for predicting subsequent behavior is almost completely unknown. The question, then, is whether elementary schools should be rewarded for producing high test scores. The answer to this depends first on the intrinsic importance of test scores, and second on the effect of such a reward system on the overall character of schools.

We know very little about the importance of elementary school children's test scores to their later lives. Test scores predict subsequent grades in school with moderate accuracy, but that is hardly a basis for taking them seriously. A child's scores also predict the number of years of school he is likely to complete with considerable accuracy. His scores predict his subsequent occupational success rather poorly, though the relationship is still significant, at least for whites.

The difficulty is that test scores measure both a general aptitude factor that is unaffected by schooling and specific skills that are subject to school influence. One cannot tell from available data whether the general aptitude factor or the specific skills lead to later success. Thus we cannot tell whether a school that boosts a child's test scores is appreciably improving his life chances. This kind of research could be carried out, but it is far from obvious what it would show. In general, even if we were to assume that schools which boost test scores also boost life chances, the available data show such a weak relationship between test scores and adult success that it would be foolish to make boosting scores the primary goal of schooling.[6]

Our skepticism about test scores is reinforced by repeated findings that the correlation between years of schooling completed and later success is much higher than the correlation between test scores and later success. Employers, in other words, pay more and give more important work to people with low scores and a lot of schooling than to people with high scores but little schooling. People who have spent a long time in school appear to have values, habits, and attitudes which make them more useful to the average employer than dropouts, even if the dropouts are good readers, verbalizers, counters, and so forth. The available data do not tell us whether people actually learn these habits, values, and attitudes in school, or whether schools simply retain people who already have them while screening out people who lack them. One thing is clear, however. The difference between the educated and the uneducated is not primarily a matter of test scores, at least as far as employers are concerned. This being so, it seems foolish to encourage schools to act as if test scores were their most important output.

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[6] For an analysis of the best available data, see Otis Dudley Duncan, "Ability and Achievement," Eugenics Quarterly, March 1968.

Some advocates of payment for results accept the view that test scores are not very important in themselves, but argue that a school which maximizes test scores is also likely to develop other characteristics that will give students more control over their lives. This argument may be correct, but we have seen no evidence for it. We have already seen that the individuals who do well on tests are not especially likely to be the individuals who do well in later life. We can therefore see no reason for assuming that schools which produce high test scores will be the same as schools which produce high incomes, happy parents, concerned citizens, or whatever else a school ought to produce.

One final difficulty deserves attention. We know very little about the non-school influences that affect students' test performance. Socio-economic status and race are known to be important, but a precise measure of their importance is not available. Yet if schools are to be paid on the basis of how much they boost students' test scores, some system must be devised for ensuring that this does not induce schools to take white, middle-class children whose test scores are likely to rise rapidly, and to reject black, lower-class children whose test scores are likely to rise more slowly. There is no theoretical obstacle to developing equations which predict individual achievement on the basis of diverse non-school factors. We could then reward schools when their students exceeded the predicted level, and penalize them when their students fell below the predicted level. But this would be extremely difficult to do politically.

Our overall conclusion, then, is that we need far more research on the validity of test scores as measures of school output before we initiate a program which encourages all schools to place more emphasis on such scores and less emphasis on other outputs of schooling that both parents and educators have traditionally thought important. This does not, of course,mean that no school should be encouraged to establish contractual arrangements in which payments were proportional to gains on standard tests. But this would be a matter of choice, not a district-wide requirement.

7. Regulated Compensatory Model

The Regulated Compensatory Model resembles the Egalitarian Model in that every child would receive a voucher roughly equal to the cost of the public schools of his area. No voucher school would be allowed to charge tuition beyond the value of the voucher. If schools wanted to increase their expenditure per pupil beyond the level of the vouchers, they could seek subventions from churches or from federal agencies and foundations for special purposes. They could also increase their incomes by enrolling additional children who were in some way disadvantaged. The extra costs of educating these children would be defrayed by the EVA. The EVA would pay every school a special "supplementary education fee" for every child with special educational problems.

The most difficult question about the Regulated Compensatory Model is how to decide which children have special problems. Some cases are obvious, such as the physically handicapped. But no family wants its child officially labelled a "behavior problem" or a "slow learner," even if this means that the child's school gets more money to spend on his education. We have considered several solutions, none of which is entirely satisfactory.

The first possibility would be to approach the problem directly. An over-applied school is likely to discriminate against applicants whom it expects to have trouble -- and hence to cause trouble -- in the school. In most cases this means that the school expects the child to be a slow learner; in some cases it means the school expects misbehavior. The most direct way to help slow learners would be for the agency administering the vouchers to give every child a standardized test (e.g. Metropolitan Readiness) before he entered first grade. The agency would not reveal the child's score on this test to the child, his parents, or the schools to which the child applied. His score would simply be placed in his file. A formula would then be adopted for adjusting the value of each child's voucher according to his test score. Vouchers might, for example, start at $750 for children who scored at or above the national average. They might rise to $1500 for children at the very bottom of the scale. But nobody would know the value of any specific child's voucher. When a school turned in its vouchers, the administrative agency would compute their total value and send the school a check. It would not tell the school which of its students were "worth" more and which were "worth" less. (A school could, of course, institute its own testing program if it wanted to do so, and this would give it a rough idea how much any given child was bringing in.)

It is important to emphasize that while the amount of money available to specific schools would depend on the initial ability of their pupils, the amount of money the school spent on any particular pupil would not necessarily depend on his ability. The school could, for example, use its extra resources to provide every child with small classes. This might encourage parents with able children to enroll them in these same schools. Such students could, in turn, both ease the school's problems in attracting staff and serve as directly useful resources to less adept classmates.

The principal difficulty with this scheme is that mental tests are understandably unpopular with many parents. Minority groups are particularly likely to reject their use. Whether such objections would be muted by the fact that the testing program resulted in spending more money on minority children is uncertain.

If direct testing of pupils were impractical or politically unacceptable, the next best alternative would probably be to collect socio-economic data from families with children in each school. Families might, for example, be required to state their taxable income for the previous year when turning in their vouchers. If this were a sworn statement and was supposed to correspond with figures submitted to IRS, cheating would probably not be a major problem. The agency administering the voucher scheme could then make additional payments for each low-income child.

The difficulty with this scheme is that children from low-income families are not necessarily hard-to-educate children. The correlation between income and scores on the Metropolitan Readiness Test, for example, seldom exceeds 0.4 and is considerably less in many populations. If a school had a large number of applicants among whom it could pick and choose, it could quite easily choose a first grade whose average score on most standard tests was quite high, even though its median family income was low. This possibility would be only slightly reduced if statistics were also collected on parental occupations and education.

The best way around this problem would be to insist that schools admit applicants randomly. This would not, of course, rule out selective recruitment and publicity. But schools whose location, program, or publicity attracted large numbers of poor applicants would almost certainly also attract large numbers of low-IQ applicants. Thus a combination of non-discriminatory admissions and incentives for enrolling low-income pupils might achieve the same result as direct incentives for enrolling low-IQ pupils.

Another version of the Compensatory Model might be more acceptable to those who take a strict view of the First Amendment "establishment of religion" clause. This version would inflate the value of each child's voucher if he came from a low-income family. The difficulty with this approach is that it might be harder to sell politically than a system which paid bonuses to schools for enrolling these same children. Suppose, for example, that family income were deemed the only practical way of discriminating between the advantaged and the disadvantaged. Many middle-income families would probably object to having their vouchers worth less than vouchers assigned to indigent neighbors. They would rightly cite innumerable cases in which their indigent neighbors' children were no more difficult to educate than their own, and would argue that they were being discriminated against simply because they worked harder and earned more. If, on the other hand, the bonus was paid to the school rather than to the individual, and if schools were not allowed to discriminate on the basis of ability, many of these inequities might even out. Barring deliberate selection, schools with low median incomes will almost always have a harder overall job than schools with high median incomes. This is fairly easy to demonstrate to any interested parent -- though demonstrating it obviously does not ensure that parents will accept the principle that the schools with the toughest problems should get the most money.

If the EVA wanted to place primary emphasis on economic sanctions and incentives and did not want to regulate admissions procedures at all closely, another version of the Regulated Compensatory Model might be appropriate. If admissions procedures were left unregulated, privately-managed schools would have a considerable advantage over their public competitors in attracting middle-class parents, because they would be freer to exclude students whom they judged undesirable for some reason. In order to offset this advantage, it might be desirable to charge middle-class parents for attending a privately-managed voucher school. Charges would be based on an official formula which determined ability to pay, but could not exceed the basic voucher (e.g., $750). Parents who sent their children to a publicly managed voucher school would be admitted free, no matter what their income. Children from families with below-average incomes would be admitted free to either publicly or privately managed voucher schools. The net effect would be to penalize affluent families for leaving the public system, but not to penalize others. This seems appropriate if other regulations place the publicly managed system at a competitive disadvantage. It would not be appropriate if publicly and privately managed schools were all on the same competitive footing, as we have urged.

In the short run, a compensatory scheme of this kind would substantially increase both the tax burden and the overall level of expenditure on education, since it would involve spending more money on the disadvantaged and could hardly involve spending less money on the advantaged. In the long run, on the other hand, it might have the opposite effect, since it might reduce the interest of advantaged parents in increasing expenditures for education.

Such a scheme would also lead to an increase in the percentage of educational resources going to the poor. If, as seems likely, it also led to a greater measure of socio-economic integration than the present system, a Regulated Compensatory Model would presumably result not only in redistributing expenditures but also in redistributing resources.

The Regulated Compensatory Model would give schools considerable latitude in determining their own expenditure levels. It would also give parents considerable choice about the expenditure level of the school in which they enrolled their children. In both cases, however, the price of choosing high expenditures would be dealing with large numbers of disadvantaged children.

A scheme of this kind would also be likely to produce more racially, economically, and academically mixed schools than the present system, giving more parents a choice as to the kinds of classmates they wanted their children to have. But again, the price of choosing more advantaged classmates would be that the school had less adequate economic resources.

This is not to say that integration is likely to be complete. We doubt, for example, that any politically feasible system of economic incentives could induce over-applied schools, public or private, to enroll their share of the children with severe behavior problems or severe mental retardation. Economic incentives might, on the other hand, persuade over-applied schools to accept children whose only fault was an IQ of 95 or an unusually large repertory of four-letter words. We expect, in other words, that economic incentives could reduce or perhaps even eliminate discrimination against pupils who belong to the "middle majority." Since incentives will not suffice for dealing with extreme cases, special schools, which might be either publicly or privately managed, would still have to take responsibility for most of these children.

Finally, the Regulated Compensatory Model would provide parents of all kinds with a fairly wide range of program alternatives. The only real option that would be excluded is the school which combines unusually affluent children with unusually ample resources. While this is doubtless the option many people really want, it is not an option that can possibly be available to most people under _any_ system. Furthermore, a system that makes such schools available to a privileged few cannot hope to attain the other goals which we think important.

The basic difficulty with the Regulated Compensatory Model, of course, is political, but even this difficulty may not be as serious as it looks. Its principal political virtue is that it might well be attractive to the public schools. This could be especially true in cities where large numbers of parents have already deserted the public schools for independent or parochial alternatives. The Regulated Compensatory Model would offer all voucher schools substantial additional funds for undertaking to educate the most disadvantaged segments of the population. Instead of exacerbating the flight of the middle classes, a model of this kind might help the public schools finance a program that would hold such parents.

A Regulated Compensatory Model might not be as attractive as the Egalitarian Model to most parochial schools, since they seldom enroll many really difficult children. Nonetheless, the compensatory model would give the parochial schools substantially more public money than they are getting now. It would also give them more than they would get under most proposed "purchase of services" schemes. The only important reason for them to oppose it would be if it imposed unacceptable restrictions on their admissions procedures.

The major opponents of the Regulated Compensatory Model are likely to be middle-class parents who would like to be able to take their children out of the public schools, get a voucher of a certain value, and then be able to use their own money to make the child's new school more affluent than the public system. In the long run, such parents could be a potent political force.

Conclusions

In weighing the seven alternatives outlined above, four general conclusions stand out:

-- The effects of various models on the tax rate and on the overall level of educational expenditure are uncertain without detailed estimates of the schedule of payments for different categories of schools and children, and detailed projections of likely parental choices among the alternatives available under each scheme.

-- While most of the proposed schemes appear at first glance to give the poor a larger share of total educational resources than the present system, this appearance is often deceptive. While the more adequately regulated models would lead to more equal expenditures, most would also lead to more segregation by ability and/or income. A scheme which leads to more segregation will raise the relative price of most resources for disadvantaged children. Such relative price increases would probably offset the effect of equalizing expenditures. Only the Regulated Compensatory Models seem likely to give the poor a larger share of the nation's educational resources.

-- Any system which gives schools discretion in choosing among applicants will inevitably reduce the range of choices open to parents whose children are deemed "undesirable" by most educators. Lotteries and quota systems might partly offset the effect of educators' preferences for certain kinds of children. But some system of economic incentives is also needed to ensure that schools give disadvantaged students a reasonable chance of getting into the school of their choice.

-- The fundamental political and pedagogic danger posed by most voucher plans is that a few publicly managed schools would become dumping grounds for the students whom over-applied schools, both public and private, did not want. The over-applied schools would become privileged sanctuaries for students whom educators enjoy teaching. In order to avoid this danger, a voucher system must provide economic incentives for enrolling "undesirable" children.

The seven models analyzed in this chapter by no means exhaust the full range of possibilities. Neither have we examined all the possible consequences of each model, especially given the variety of possible assumptions about admissions regulations to accompany each economic model. We hope to cover these issues more fully in our final report.[7]

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[7] Three alternatives at least deserve brief mention:

(a) The "California" Model. This model makes eligibility for a voucher conditional on the local public school's having mean reading scores substantially below the national average.

(b) The "Escalator" Voucher. This model makes the overall level of tax support for the EVA contingent on the overall level of private expenditures for tuition, by guaranteeing a fixed ratio between the two.

(c) "Incentives for Integration." This model makes the value of a school's voucher partially contingent on how close its student body comes to some "optimal" racial, economic, or academic mix.

3. Matching Pupils to Schools

Proponents of vouchers have not given much attention to procedures for matching pupils to schools. This is unfortunate, since the problem is in many ways more complex and potentially controversial than the creation of economic ground rules for a voucher system.

The matching of pupils to schools has three discrete stages: "application," "admission," and "transfer." In the "application" stage, voucher schools seek applicants, and applicants appraise schools. Schools may recruit actively, or they may rely on such passive means as word of mouth, newspaper coverage of their activities, or the appearance of their buildings. Schools may also recruit selectively, aiming to attract unusually well behaved children, black children, white children, or children with certain talents. The danger at this stage is that many families may fail to obtain the information they need to make reasonable choices. The more sophisticated will find out about the "best" schools and apply to them even if they are not near their homes. But most disadvantaged families may well end up "choosing" the school nearest them unless there is some machinery for informing them that other schools are available that might serve their children better.

When applications close, some schools will have more applicants than they have places, while others have more places than applicants. We will call the first schools "overapplied" and the second "underapplied". At this point we enter the "admission" stage. Overapplied schools must accept some pupils and reject others. Unless some regulatory system prevents it, these schools will accept the children they regard as "desirable" and reject those they regard as "undesirable." We will call this "selective" admission in that it will inevitably discriminate against some categories of applicants and in favor of other categories. Children who are rejected by their family's first choice school must go to their second, third, or fourth choice. (We assume that under any voucher system a local board of education would continue to exist, and that it would continue to ensure that there were enough places in its district for every child who did not want to attend a privately managed school.)

After school opens, the matching process enters the "transfer" stage. Schools will find that they would like to get rid of certain children. They ask these children to withdraw -- usually at the end of the year but sometimes more precipitously. Some parents will also find that their child's school is not what they had hoped. They may withdraw their child, either at the end of the year or before. In some cases these children will be able to get into another school. In other cases they will have great difficulty. The rules governing both suspension and expulsions therefore require careful attention if every child is to be given an education.

One of the great unanswered questions about the voucher system is whether the overall problem of matching pupils with schools will be large or small. To some extent a voucher system contains a mechanism within itself for dealing with surplus applicants. If a given type of school has excess applicants, other similar schools can spring up to serve these applicants. On the other hand, a look at existing private schools makes it clear that competition of this kind cannot be expected to do the whole job.

Some private schools have more applicants than places despite the fact that there are hundreds of competing institutions.

Sometimes this is because they have large endowments and provide services other schools cannot match. But applicant surpluses could not be entirely eliminated by a redistribution of educational resources. Certain private schools would still have the same appeal as an exclusive club. Many parents want their children to attend these schools simply because they are difficult to get into. The family knows that if its children do get in, they will have more carefully selected classmates than at most other schools. They also know that because the school is hard to get into, it has a prestigious diploma. This will be true to some extent of any overapplied voucher school, public or private.

The three stages of matching will be discussed in detail in the succeeding sections.

Application

A voucher program depends on parents' intelligently choosing the right school for their child. Therefore, two things must be provided as part of any voucher program.

-- Parents must be informed of all the available alternatives.

-- Parents must be able to obtain accurate, relevant, and comprehensible information about the advantages and disadvantages of each alternative.

Experience with other "free market" situations suggests that these developments will not take place spontaneously. Unregulated markets seldom ensure that consumers are aware of every available product, and they almost never provide consumers with sufficient information to evaluate these products. Low-income families are particularly unlikely to be informed of the full range of choices open to them, and thus are particularly susceptible to misleading and irrelevant claims.

Voucher schools are likely to recruit selectively if they can, and this may have more impact on the eventual mix of students than either a school's admissions policy or its expulsion/withdrawal policy. Some may make information about themselves available in a selective manner, e.g., by advertising in a newspaper which has predominantly middle-class readership. Others will make claims designed to appeal to a particular clientele; e.g., "The curriculum emphasizes Afro-Americans' culture." Some will simply encourage certain parents when they bring their child to the school, while discouraging others. A school can easily make an "undesirable" parent feel unwanted at this stage without violating any enforceable law or regulation. Similarly, it can give potential applicants an IQ test. It can then tell parents whose children do poorly that the child would probably have trouble doing the work, and that he would really be happier in some other school.

No system can eliminate these practices entirely or avoid all their undesirable consequences. Some system of public regulation can, however, help. It seems reasonable to assume that no two local EVA's will establish precisely the same regulatory machinery or guidelines. Nonetheless, certain general problems will exist in every jurisdiction, and it is therefore appropriate to suggest some possible mechanisms for solving them. Ideally, each EVA should:

1. Ensure that every family is informed of the range of alternatives open to it before applications close for any school.
2. Ensure that "objective" information is collected about each school which will answer parents' questions as well as they can be answered.
3. Ensure that this information is available to parents both in a clear, comprehensible printed form and through face-to-face contact with counselors who can explain

the printed information to those who do not understand it.

4. Ensure that misleading advertising claims are controlled and that "objective" information provided to parents is correct.

5. Investigate claims of fraud, discrimination, and deception, and take appropriate remedial action where these claims are verified.

1. Making Parents Aware of Their Choices

If schools advertise and recruit selectively, many parents will be unaware of the choices open to them. The EVA must therefore provide some way of ensuring that parents know how the voucher system operates, and that they know about all the different schools.

Because the EVA will have to establish some procedure for distributing vouchers, it seems logical to distribute information at the same time. This would ensure that any parent who had a voucher had also received information about what he could do with it.

There are at least three possible ways of distributing both vouchers and information: through the mails, through the schools, and through EVA offices. (If the EVA were responsible for a large district, it might be desirable to establish a number of neighborhood offices.) Individual communities would doubtless prefer different procedures. Distribution through EVA offices seems generally preferable, however.

Suppose each parent had to visit an EVA office in order to receive a voucher. The EVA could then ensure that parents not only receive information about all available schools but also that it be explained to them. Voucher "counselors" could explain the written information the EVA provided on schools, and answer any questions. EVA personnel would probably be more objective than school personnel, since they would have no personal interest in either recruiting children for a particular school or discouraging them from applying to it.

The problem with this approach is getting parents to the voucher office. At present, a parent usually calls or visits a school to enroll his child. Under a voucher system, schools would refer such parents to the EVA so that they could obtain a voucher. One problem with this approach is that parents often wait until the first day of school to enroll their children. A voucher system requires earlier applications and decisions, so that schools can make plans before September.

Each local EVA will therefore have to inform the parents of all children of the requirement that they visit a voucher office and apply to a school sometime in the spring before the child is to enter. A general mailing is an obvious device. In some communities this would have to be supplemented by some form of personal contact. Some local authorities would undoubtedly adopt other procedures. No matter what procedures are adopted, though, some children will show up for school in the fall who did not apply the previous spring. These may be children who have moved into the district during the summer, or children whose parents were somehow missed in the dissemination of voucher information. This problem will vary in magnitude and will presumably diminish as parents become familiar with the system. Still, the problem will never disappear entirely. It will, moreover, often be especially serious among disadvantaged families.

Late enrollees must also have some choice about where they attend school. Schools might therefore be required to reserve a certain number of places for them. The number of such places, and the way in which they are filled, would depend on the character of the local community.

2. Providing Information

In order to exercise intelligent choice, parents must not only know that there are alternatives open to them, but they must also know what the alternatives are like. The EVA must therefore establish an agency to collect and distribute information about schools. This agency should see that (1) information is collected, (2) the information is what parents need, (3) the information is accurate, and (4) the information actually gets to parents.

The easiest way to ensure that schools provide information to the EVA is to make the provision of information a requirement for cashing vouchers. The question of what information the EVA should collect is more complex.

Federal and state agencies which helped to underwrite the vouchers would doubtless require that the EVA collect certain kinds of information. They might, for example, demand financial information about each school which would enable any interested person to determine how each school spent its voucher money. A school run by a private company would have to report its profit rate; a school run by a local board of education would have to report how much of its income had been diverted to children in other schools; a church school would have to report how much of its income had been paid to a religious order for the services of teaching sisters; and so forth.

Local parents would also want the EVA to collect information relevant to their choice among schools, and the EVA should have full authority to do this. Such information would fall into two categories: information that facilitated comparison of schools with one another, and information that facilitated judgments about whether schools lived up to their own unique claims.

In order to allow comparisons among schools, the EVA would presumably collect certain information from all voucher schools. Is the building fireproof? Does it have a gym? Does it have outdoor play space? What percentage of the teachers are certified? How old are they? How many have Master's degrees? Is reading taught primarily by phonics? Is the program consciously modeled after Summerhill? How many pupils are there in the average classroom? How long is the school in session each day?

The EVA will probably also be asked to collect information about student achievement. Information of this kind is subject to serious abuse, and considerable effort must be made to ensure that it is not misleading. The absolute level of achievement in a given school is largely determined by factors over which the school has no control, such as family background. Furthermore, the overall level is not always a reliable indicator of performance for specific kind of students (e.g., minority students). If schools are to be compared in terms of test scores, then, their relative effectiveness with groups from specific socio-economic and ethnic backgrounds should be compared, not just their overall scores. A testing program should also provide information about students' performance on standardized tests before they entered the schools as well as after attending it, so that differences in initial ability can be taken into account. The technical problems involved in such presentations are not overwhelming, but they require more attention than they usually get from local school districts.

In evaluating schools' unique claims, the EVA might ask schools to suggest their own measures of success. If, for example, a school claimed to develop "responsible citizenship," it might suggest that the EVA count the number of its alumni arrested in the previous year. If the school claimed special success in preparing children for college, the EVA might ask the school to provide evidence of such success.

Items about which advertisements make frequent claims should be automatically checked by the EVA. Thus, if many schools make claims about average class size, the agency should establish a definition of average class size and collect information about it.

The data collection agency should be governed in such a way as to make it responsive to the requests of particular interest groups. Thus, if one interest group wanted to know how many American flags schools owned, it should be easy to collect this information. Some parents might use this information in evaluating schools, while others would ignore it. Honoring reasonable requests for information from interest groups should ensure that more diverse and informative data is gathered.

The agency must also have the power to verify the data it collects. It should be empowered, therefore, to investigate any complaints that the information released by a school is false. If it finds deliberate fraud, it might be authorized to require the school to publicize a retraction. Other appropriate sanctions could also be provided. Because the EVA has the power to certify that a school is not eligible to receive vouchers, it should be able to demand adherence to its regulations.

3. Distributing Information

In addition to collecting data, the agency must take responsibility for distributing it. It should presumably publish a booklet containing the information it has collected about each school. It must make this booklet as readily accessible as is possible, with the data presented in easily comprehensible form. The booklet ought presumably to give schools some space to describe themselves, too. It might also mail a newsletter at reasonable intervals, with corrections and additions to the basic information.

The EVA should not, however, rely on mailings alone to distribute information about schools, any more than it can rely on mailings to inform parents of the existence of voucher schools. It should establish counseling services in EVA offices which would help parents understand the basic materials and answering questions about the school.

4. Monitoring Claims and Policing Discrimination

Schools will presumably advertise and recruit privately. If parents are to make sensible choices, there must be some assurance that schools are presenting themselves to parents truthfully and fairly. The EVA's data collection provides some check on such advertising. Schools should be forbidden, for example, from making advertising claims contrary to the EVA data.

Local EVA's could set other standards for truth in advertising. The experience of the Federal Trade Commission suggests these will be difficult to enforce; nonetheless, some effort is better than none.

5. Providing Advice

Parents will, no doubt, want information as to which school is "best". Not all parents will be able to visit all schools, nor will they necessarily feel confident in their appraisals. It does not seem appropriate, however, for the EVA to provide such advice. This is a field best left to private groups: newspapers, counseling agencies, consumers' unions, the Women's Civic League, etc. Such groups will naturally be interested in school curricula. The EVA might want to facilitate parents' access to private interest groups by providing them with space in its offices at the time parents are registering their children to ensure greater diversity in viewpoint than would be provided if a single public agency had to reach consensus as to which were the best schools. In addition, private interest groups should help police the EVA, ensuring that it responds to complaints and does not make "subjective" judgments of quality in the course of providing information.

In summary, the responsibility of the EVA during the application phase is to counter a variety of potentially harmful effects of school recruiting practices. The EVA must ensure that all parents know that they have choices and what their choices are. It must also provide recourse for those who have suffered from unfair treatment by the schools. These responsibilities suggest the need for a data collection agency, a counseling service, and a complaint administration within the EVA.

Admission

We will examine seven possible sets of ground rules for regulating admissions procedures:

1. No regulations whatever.
2. Lottery among applicants for at least 50 percent of all places.
3. Lottery among applicants for almost all places.
4. First come, first served.
5. Quotas based on characteristics of applicants.
6. Quotas based on characteristics of districts or neighborhoods.
7. Admission based on geographic proximity.

The impact of these seven admissions systems would obviously depend in part on which economic model was chosen by the EVA. We will assume that the regulated compensatory model is in operation. This would give schools additional money for taking children from low-income families. (Alternatively, they might get additional money for taking children with low test scores. This would be harder to sell politically, but as we shall see, it would have pedagogic advantages under certain circumstances.) They could not charge tuition under our preferred mode. In some cases we will consider other economic models, but we will not attempt an exhaustive treatment of all possible combinations of economic models with admissions systems.

We will apply four general criteria when evaluating possible admissions procedures.

1. Would the proposed regulations ensure that schools did not discriminate against any category of disadvantaged applicants? If a voucher system is to serve the interest of disadvantaged parents and children, admissions regulations must at least prevent schools from discriminating against such applicants. It is true, of course, that economic incentives may encourage schools to admit low-income applicants, but economic incentives of this kind will not suffice to ensure that schools admit truly disadvantaged children. Incentives which reward the admission of low-income applicants will initially result in schools' seeking out families which are short on cash but long on other "desirable" characteristics, such as literacy, initiative, and self-discipline. Unless some machinery is established for preventing discrimination on the basis of IQ and behavior patterns, overapplied schools will get big bonuses for taking the most easily educated children of poor families, while leaving the others to underapplied schools.
2. Would the proposed regulations convince disadvantaged parents that their children had a fair chance of getting into any voucher school to which they applied? Economic incentives will not persuade disadvantaged parents that

there is no discrimination. Such parents may not bother to apply to a popular school simply because they will think they have no chance of getting their child in. Admissions regulations ought, if possible, not only to ensure non-discrimination in fact, but ought also to be designed so that all parents perceive that discrimination is not taking place.

3. Would the proposed regulations ensure that all schools end up with racially, economically, and academically mixed student bodies? Regulations preventing discrimination against the disadvantaged should, when coupled with economic incentives, do at least as much as the present neighborhood school system to ensure racial, economic, and ability mixing in schools. In theory, however, a voucher system could go much farther and try to establish a pupil assignment system which required such mixing in every voucher school, even when its applicants were almost all of the same race, income group, ability, or whatever. We are not enthusiastic about such regulatory efforts. Certain voucher schools will attract large numbers of disadvantaged children, while others will not. This seems perfectly acceptable if the matching process is voluntary on the part of both schools and parents. If disadvantaged children were excluded from certain schools, or if schools enrolled large numbers of disadvantaged children only because they had no other applicants, the division of labor would be involuntary and probably destructive, but if schools are deliberately established primarily for disadvantaged children, and if disadvantaged parents prefer these schools to predominantly middle-class ones, we would not favor an arbitrary attempt to impose racial or economic integration by administrative fiat.

This judgment may seem inconsistent with our earlier argument that disadvantaged children generally benefit from attending school with advantaged classmates. The key phrase, however, is "generally." Logic, observation and the available data suggest that most disadvantaged children in existing public schools are better off when their school also enrolls advantaged pupils than when it does not, but what applies to "most" children does not necessarily apply to any particular child, and what applies to the existing public system would not necessarily apply to future voucher schools. Certain disadvantaged children may do better in schools where they do not have to compete with advantaged children. If schools dealing with disadvantaged children had different kinds of teachers, different curricula, and different relationships to their community, the number of children who were better off in such schools than in schools with predominantly middle-class students might be even larger. Disadvantaged parents should, therefore, be free to enroll their children in either an "advantaged" or "disadvantaged" school, as they see fit. It is, however, important to keep in mind that the only way to give these parents a real choice is to prevent predominantly white, middle-class schools from discriminating against disadvantaged applicants.

4. Would the regulations encourage or discourage the establishment of new schools for the voucher system? More particularly, how would they affect the nature of the new voucher schools that were established? We expect the establishment of a voucher system to make possible the establishment of new schools. We further expect these to be new schools of two quite distinct kinds, business enterprises and social or educa-

tional experiments. A complete absence of admissions restrictions would be best for encouraging the establishment of new voucher schools, but our concern for the internal justice of the voucher system makes some restrictions necessary. Any given restriction will, however, have some effect on the climate favoring the establishment of new schools. Our essential criterion has been to opt for admissions procedures favoring random admission of children. Under such a rule, the schools will be discouraged only if they had counted on keeping out children whose education would be expensive or difficult. We have, however, limited this effect by building in mechanisms for the encouragement of compensatory education for disadvantaged children, the one case in which selective admissions and specialized curriculums might be the most desirable.

We turn then to the seven alternative systems for regulating the admissions process.

1. No Regulation

If no admissions regulation were established, the results would vary according to the economic model. In an unregulated market where every school could charge as much tuition as it wanted, schools would almost all admit students according to a double standard. Poor students would compete for scholarship places; students who could pay the full tuition would have far more places open to them. The result would be a combination of economic and academic segregation. The students who were most advantaged by either criterion would then get the most resources, while the students who were least advantaged would get the least resources. We have discussed the consequences of such a system in Chapter 2.

If we assume a regulated compensatory model, on the other hand, schools would have considerable incentive to attract and admit low-income students. There would, however, be no special incentive to admit hard-to-educate children. Most voucher schools would, therefore, try to select poor children who were also bright and well-behaved. Thus, even a compensatory model would have several unpleasant consequences if there were no additional regulations on admissions:

First, overapplied schools would probably end up segregated by ability and behavior, which would also mean some segregation by race. Disadvantaged parents would see these schools, whether publicly or privately controlled, as bastions of privilege, to which only "token" low-income children were admitted. Few disadvantaged parents would bother to apply. The net result could easily be to erode rather than to strengthen the legitimacy of the schools.

Second, low-IQ children and children with behavior problems would probably be left to the less desirable schools. These schools would have ever-increasing difficulties in attracting staff and offering an adequate program. The more segregated the system became in terms of ability, the less likely a disadvantaged child would be to learn anything at all.

Third, most existing public school systems would expect privately operated voucher schools to concentrate on advantaged children no matter what the system of economic incentives. They would, therefore, expect to be left with a disproportionate share of all disadvantaged children and would oppose the plan.

Fourth, the federal courts might declare the whole plan unconstitutional. The Supreme Court has indicated that vouchers cannot legally be used to aid private schools which exclude children on the basis of race. A federal district court has taken this argument even further, holding that the judiciary cannot be expected to police discrimination by individual private schools.

This implies that a voucher plan must include appropriate administrative machinery for preventing discrimination by race in order to meet Constitutional requirements.

2. Fifty Percent Lottery

Under this system a school with more first-choice applicants than places is allowed to fill up to half its places by any criteria it wishes, so long as these criteria do not discriminate against any racial minority. It must then fill its remaining places by a lottery among all first-choice applicants not already admitted.[1] Fifty percent of vacant places might be exempted from the lottery for three reasons:

First, families with one child in a school should be allowed to enroll the child's younger brothers and sisters if they want to.

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[1] There are several alternative theories about how a lottery ought to be conducted. One theory maintains that parents will expect schools to cheat. In order to allay such suspicions, admissions must be based on something parents can check up on. Birthdays would be ideal for this purpose. As in the draft lottery, the 366 days of the year would be drawn from a hat in some random order. Every school would then be required to admit applicants in this order. A parent whose child was drawn early could presumably find out if others with lower priority got admitted ahead of him.

An alternative theory maintains that the ideal mechanism is one which does not depend on any identifiable characteristic of the child, and is independent for each school. According to this theory, the best way to run a lottery is for every parent to put his child's name in a hat. Somebody would then pull as many names out of the hat as there were places in the school. This would be simple, direct, and non-invidious.

The choice between these and other "fair" methods should obviously be made by the agency running the voucher system on the basis of what parents themselves find most acceptable.

Second, parents who establish a school must be guaranteed a place for their children. Otherwise, parents are unlikely to make the effort needed to set up schools. So long as some reasonable maximum number of "founders" is established, and so long as these founders are listed when the school is incorporated, no serious difficulties should arise.

Third (and this is more controversial), some students have special talents. A school with a particular program may feel that a particular student would make a special contribution to its program, and hence to the education of other students. If, for example, a school specializes in music, it may want a cellist for its orchestra. If the school is bi-lingual, it may want to discriminate in favor of children whose native language is not English, on the grounds that it takes a certain "critical mass" of such children to make the overall idea of the school work. If a school is almost all white, it may want to discriminate in favor of its few black applicants in order to ensure that there are enough blacks to give one another support. (While a non-discriminatory requirement with respect to race should be applied to schools' "free choice" selections, schools with very small numbers of black or white applicants ought to be allowed to discriminated in their favor, for reasons given in the text.) This whole line of argument is a logical corollary of the proposition that a student's classmates may be his most important resource.

How far a school should be allowed to pursue this logic is unclear. If schools selected students on the basis of what they would do for one another, we would be inclined to give educators considerable leeway. Experience suggests, however, that schools tend to select students on the basis of what they will do for the school. Schools prefer students who will make the teachers' lives pleasant, not students who will enrich their classmates' experience. Schools can, however, always generate pedagogic rationalizations for their policies, whatever these may be.

One school says it must select bright students in order to have an accelerated curriculum. The question, then, is how to evaluate schools' claims that their particular variety of selective admission is essential.

Ideally, schools should be free to admit selectively so long as their criteria do not reinforce other patterns of "invidious" discrimination in the school system or in the larger society. The idea of favoring cellists over pianists, for example, seems harmless because it does not aggravate any of the more general problems of the educational system. The idea of favoring Spanish-speaking or black applicants seems acceptable to us for the same reason. The idea of discriminating against children against whom everyone else also discriminates is less acceptable. The education of disadvantaged children is a public responsibility in which every school that receives public funds ought to share.

As a practical matter, however, it would be hard to establish machinery for certifying one school's reasons for selectivity as "non-invidious" while ruling out another school's reasons as "invidious." It seems administratively simpler to allow all schools up to 50 percent free choice on all matters but race and to require all schools to admit at least 50 percent by lot. The 50-50 division is plainly arbitrary. If a lottery is to provide anything like a fair chance, however, we think it would have to cover at least 50 percent of the places in a school.

In discussing a lottery of this kind, several points are frequently misunderstood. First, a lottery among applicants to a school should not be confused with a lottery among all students in a district. We are not proposing that students be assigned to schools by lot, but only that a school be forced to choose among its applicants by lot. The lottery, in other words, maximizes the choices actually open to disadvantaged parents by limiting the schools' ability to reject parents' choices.

Second, the lottery only applies to a school which refuses to expand. If a school wants to be sure of having places for all applicants of a certain type, (e.g. those living in the neighborhood), it can always solve its problem by expanding and accepting all applicants. This is what public schools usually do.

Finally, it is worth emphasizing that allocating half of all places by lot does not necessarily imply rejecting any appreciable number of applicants. If a school has 110 applicants for 100 places, it admits 50 in whatever way it wants and holds a lottery for the other 50 places. A non-favored child thus has five chances in six of getting in.

The principal drawback of a lottery is that many privately controlled voucher schools would consider the diminution of their control over entry undesirable. Those parochial schools which now admit students selectively might find a lottery so unacceptable that they would refuse to participate in the voucher system. We have no doubt that lottery requirements would discourage some people from starting voucher schools. Educators with a primary interest in helping disadvantaged children would, however, be less put off by a lottery requirement than others.

3. Near Complete Lottery

This model allows schools to admit siblings, children of official founders, and children of staff automatically. All others would be admitted by lot. If a school wanted special kinds of students, it would have to get them by selective recruitment. ("Classes are conducted in Spanish.")

This model has the advantage of reducing the possibilities for discrimination in the admissions process and encouraging disadvantaged parents to feel they have a fair chance. It might, however, prevent the development of certain desirable types of program diversity. It would also prevent "benign quotas."

Suppose, for example, the school has 50 applicants for 20 places. Suppose that 5 of these applicants are black. The school might well want to admit all 5, so that the black students would not feel isolated amidst so many whites. Under a complete lottery, however, the chances are it would get two blacks, and it might get one or even none.

A full lottery might also make it more difficult to give the staff a sense of involvement and control over "its" school. Staff control is a mixed blessing, but it creates an atmosphere which not only staff members but many parents value. A full lottery might seriously inhibit the establishment of new private voucher schools, and it might make participation unattractive to some existing parochial schools.

4. First Come, First Served

"First come, first served" has the apparent virtue of rationing places by giving them to the people who care the most. As a practical matter, however, it is not so simple. Reduced to its logical absurdity but practical reality, "first come, first served" would mean that really popular schools would begin registering children at birth. If children were registered at birth, the next question would be what class they could register for. Consider an example: a school has four times as many potential customers as places. It begins registering children on January 1, 1971, for a first grade that will enter in September, 1977. All its places may be gone by the end of March. Must it then allow parents to apply for the first grade that will enter in September, 1978? If not, "first come, first served" turns out to be a device for allocating scarce places partly in terms of birthdates (i.e., the lottery in a new guise), and partly in terms of foresight. This would probably work against the interests of the parents whom a voucher system is supposed to help.

5. Quotas Based on the Characteristics of Applicants

This model regulates admissions by making a rule that schools cannot discriminate against applicants on the basis of certain characteristics which would be specified by the EVA (or by state or federal legislation). Discrimination based on race, income, IQ, religion, and sex would be obvious candidates for elimination.

Having established these rules, the EVA would require parents to send it duplicate copies of their applications to schools. The applications would include information about each of the characteristics for which discrimination was forbidden. The EVA would then compute the average level of "advantage" of applicants to each school by various criteria. The average level of the students actually admitted to the school could not exceed the level of those who applied by a significant margin on any criterion. It could presumably be lower. Thus, if the average income of applicants' parents was $6700, the average income of families whose children were admitted could not exceed $6700, although it could be less.

This model is in some ways a logical variant of the lottery models in that it allows schools to select by any criteria they think appropriate, so long as these criteria do not reinforce an officially prohibited pattern of discrimination in the larger society. Deciding what kinds of discrimination to outlaw would, of course, be politically and administratively difficult. We can see no way, for example, to define "behavior problems" with sufficient precision to prevent schools' discriminating against applicants who have them. It might also be politically objectionable to categorize 5-year-olds on the basis of IQ scores, even if the avowed purpose was to prevent discrimination against those with low scores. Forbidding discrimination with respect to religion, while possibly necessary to ensure the constitutionality of aid to Church in religious schools, would require parents to report their religion, which governmental bodies generally have been loath to do. Racial quotas may raise similar problems.

Even if an ideal quota system could be devised, it would leave the actual choice of pupils in the hands of educators, whom many disadvantaged parents mistrust. For this reason, quotas would probably do less than a lottery to ensure the legitimacy of the overall system in the eyes of many parents.

In fact, quotas could never be established to cover every form of invidious discrimination. Quotas are, therefore, less likely than the lottery to ensure that certain categories of disadvantaged applicants have a fair chance of admission to the school of their choice. In particular, the inability of a quota system to prevent discrimination against children whose behavior does not conform to school norms would make it hard for these children to find a school that would take them in. While a few voucher schools might specialize in disturbed children, and a few other schools might take a small number out of idealism, most such children would probably end up in one or two underapplied schools. These schools would, in most cases, be publicly managed since private groups would probably be reluctant to take on the responsibility.

A quota system would have the virtue of allowing schools to discriminate in favor of disadvantaged children if they wished to do so. A school with a handful of black applicants and a desire to achieve racial balance, for example, would be free to admit a higher percentage of blacks than had applied. It would only be forbidden to admit fewer. Schools which wanted to move towards some ideal "mix" could thus do so if they were overapplied.

Another advantage of a quota system is that overapplied schools would probably prefer it to other systems of regulation. A quota system would allow a school to take any particular applicant it wanted, so long as it then took another applicant whose attributes balanced those of its first choice. If a school wanted a very bright child, it would be free to take him so long as it also took one or two children of below-average intelligence as well. A quota system would also allow a school to select on all kinds of "non-invidious" bases, such as speaking Spanish or interest in music, so long as this selection did not promote segregation along such lines as race, ability,or family income. Most educators would probably prefer an arrangement of this kind to one which left them no discretion whatever.

The public system, on the other hand, might have the opposite reaction. While overapplied schools (both public and private) would be able to pick and choose among applicants, the public system would probably have more than its share of underapplied schools, which only filled up when no more places were left in popular schools.

6. Quotas Based on District Characteristics

Under this model, every school would be required to admit a mix of students which was "representative" of the district in which the school was located. Some definition of the term "representative" would be laid down by law or by the EVA. The criteria might include racial mix, economic mix, IQ mix, and so forth. No school would be eligible to cash vouchers unless it came reasonably close to district-wide ratios.

Taken in the pure form stated above, this system is clearly unworkable, since few schools could meet such standards. Schools that were physically located in the ghetto could not possibly attract enough white applicants to qualify, and schools located in white residential areas would probably find it impossible to attract their share of ghetto residents, many of whom value convenience or solidarity more than integration.

One could, of course, modify the quotas so as to make them easier to meet. The logical modification would be to base each school's quotas on the characteristics of its immediate neighborhood instead of its entire district. "Neighborhoods" might then be defined as including everyone within, say, a mile of the school. This approach would, however, do little to prevent discriminatory admissions policies. The housing market is highly discriminatory. A rule which merely forbids schools from being more discriminatory than the housing market is thus no rule at all. It would be ridiculous to pretend, for example, that a school which has 20% black applicants and which takes none of them is non-discriminatory simply because it is in a 100% white neighborhood.

We, therefore, conclude that quotas based on anything other than the characteristics of applicants are unworkable and undesirable in the admissions process. Their role, if any, is as a target towards which schools might be encouraged to move by means of economic incentives.

7. Admission Based on Geographic Proximity

Several black community schools established in recent years have tried to establish their "public" character by announcing that everyone in the neighborhood would be eligible for admission. While this is a perfectly reasonable principle when applied by a school in a poor area, it has a different meaning when applied by a school in a rich area. As long as residence is determined by factors over which families have relatively little control, and over which children have no control whatever, one cannot legitimately make residence the basis for school assignment. Most parents will, of course, choose schools near their homes even if they have a much wider range of choices, but that is no justification for eliminating the choice. Parents should be given the option of living in one place and sending their children to school in another place if that is what they want.

A system which gives priority to the claims of children who happen to live near a school discriminates against children who live further away. In practice, this is just a roundabout excuse for letting schools in white, middle-class areas discriminate against children who are poor, black, or ill-behaved by middle-class standards. It seems clear that this would not serve the interests of disadvantaged parents or children.

Conclusions About Admissions

The most promising device for preventing discrimination appears to be some kind of lottery. The precise percentage of places to be covered by such a lottery should be explored in more detail with prospective teachers and administrators or private voucher schools and with public school systems. It should not, however, be less than half.

-- While quota systems based on the characteristics of a school's applicants have many logical advantages and would probably appeal to overapplied schools, they might not be acceptable to local boards of education or to local political leaders.

-- The other approaches to matching students with schools explored in this chapter are unsatisfactory.

Transfer

All schools, both public and private, enroll some children whom they would rather not have. A voucher system which provides more different kinds of schools and more choices for parents might reduce the proportion of misfits, but it would certainly not eliminate them altogether.

Not only do all schools enroll some students they would like to be rid of, but all schools do get rid of some students.

Most private schools do this by persuading the child to withdraw, usually at the end of the school year. Public schools do it by transferring the child to a "special" school (or class) for the severely "retarded" or "disturbed."

In the past, private schools have been free to set their own standards of academic competence and personal behavior. When students failed to meet these standards, the private school could and did ask the child to leave. In most instances, this meant that the child either transferred to another private school or to a public school. If the child would not leave, he was expelled, but that was not usually necessary. Often no effective distinction can be made between expulsion and "withdrawal under pressure."

Public schools, on the other hand, are often required to go through a formal bureaucratic proceeding before putting a child into a special school for the "retarded" or "disturbed." In practice, many children are shunted into such institutions simply because the public schools do not know what else to do, and their parents do not know how to make an effective protest. Other children are simply "suspended" on a more or less indefinite basis. Still, a child is thought to have a right to be in a public school until somebody proves otherwise.

If privately controlled schools are made eligible for public subsidies, and if they are asked to take some share of the district's disadvantaged children in return, many are likely to encourage students they do not want to withdraw. This would partially frustrate one purpose of a voucher system. Once the word got around that disadvantaged applicants were likely to be forced out, the number of applications from disadvantaged students would also fall. Like discriminatory admissions, systematic expulsion/withdrawals would leave the burden of educating "difficult" children to underapplied schools, while allowing the overapplied schools to choose only the students whom they found it easy to deal with.

There are two ways to tackle this problem. First, there should be economic incentives for schools to retain students whom they have admitted. Second, there should be administrative regulations controlling expulsions and involuntary transfers. We prefer economic incentives to administrative regulations, but we do not think that the system can depend entirely on either one alone.

A wide variety of devices could be invented for discouraging expulsions. If, for example, children were expelled during the year, they could be allowed to take the full value of their voucher to their next school. This would give the next school an incentive for taking the child and would give the last school an incentive for not expelling him. The sums of money might be as high as $1500, which could make a difference to a principal.

Schools could also be awarded bonuses for high retention rates. This would avoid the impossible problem of making a distinction between expulsions and withdrawal under pressure. On the other hand, it might be quite complex to distinguish between schools which had high withdrawal rates because they served a transient population and schools which failed to deal with certain kinds of students.

There are, of course, some children whose education is so difficult that the staff would pay nearly anything to be relieved of the responsibility. This will be particularly true in overapplied schools. We can see no effective way to prevent schools from sorting such children out if they want to, nor are we convinced that it is in the student's best interests to remain if the school wants him out. Once a school makes its desire to be rid of a child clear, parents will fear that the child will be harassed and made even more miserable than he already is. They will almost always withdraw him if any alternative exists. Therefore, some formal machinery should be established for determining whether children are either (a) so emotionally disturbed that regular schools cannot be expected to handle them, or (b) so mentally retarded that regular schools cannot be expected to teach them anything. This machinery should do more to protect the student's rights than the machinery that now exists in most public systems. Therefore, it should probably make provision for the appointment of somebody to act as the child's advocate and include lay as well as professional representatives on the adjudicating board. Any voucher school that wanted to get rid of a child would be able to do so if it could persuade this board that the child was beyond its powers to help. At that point, the child would be assigned to a special school. The value of the child's voucher might also be increased substantially to cover the additional costs of such institutions.

The foregoing discussion assumes that the procedures for transfer of students would be uniform for both privately and publicly managed schools. We can see no justification for providing publicly and privately managed schools with the same amount of money and then allowing one set of schools to shirk the responsibilities that normally fall on the other set. Uniform standards do not, of course, actually help deal with emotionally disturbed or retarded children. Nonetheless, we can see no reason why this issue should be any harder to handle in a voucher system than in the present public system.

4. Vouchers and other State Plans for Aiding Private Schools: A Comparison

Connecticut, Hawaii, Pennsylvania, Ohio, and Rhode Island have recently enacted statutes which provide general purpose aid to privately controlled schools.[1] Many other states are seriously considering such legislation, and in several states passage of such bills appears imminent. Almost all of this legislation has been designed to prevent the collapse of the Catholic school system. In almost every instance, the legislation has been justified by two general arguments: it will save the taxpayer money, and it will preserve diversity and choice for parents. It has been opposed on the grounds that it would end the separation of church and state, exacerbate cultural schisms, and intensify racial segregation. Since many of these arguments have also been used for and against voucher proposals, a review of such state legislation may help put the merits and demerits of the voucher system in perspective.

We have not had the time or resources to analyze all the bills submitted to every state legislature in this area during recent years. Our analysis is therefore confined to the five statutes now enacted and to seven pending bills. These bills come from California, Illinois, Iowa, Massachusetts, Michigan, Missouri, and Wisconsin, and were selected for analysis either because they appear to be close to passage or because they contain unusually interesting features. Summaries of the five acts and seven bills appear in Appendix C.

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[1] A number of other states have legislation paying for textbooks, transportation, and other specific components of education, but these will not be reviewed here. Neither will we review Southern voucher programs designed to circumvent court-ordered public school integration. For citations to the legislation and summaries see Appendix C.

In general, the bills and acts take one of two forms: contracts for the purchase of secular services, or per-pupil payments to parents for private school costs. Purchase of secular services contracts usually provide that the state will pay a lay teacher some portion of his salary for time spent teaching secular courses. The contracts, which sometimes also include teaching materials and the costs of standardized testing, are negotiated between the state department of education and either the school or the particular teacher. Payment is usually provided after the service has actually been rendered. The pupil payment plans provide parents with vouchers which can be negotiated for "secular educational services" at approved private schools. The amount of the voucher sometimes equals what the state would pay a local school board for educating the child, but sometimes it is simply an arbitrary amount. A third form of aid, used in Hawaii, provides tax credits for parents who send their children to private schools.

The California bill is in many respects similar to the voucher systems outlined in previous chapters. It is not designed to save the taxpayer money but to encourage educational innovation and aid disadvantaged children. Unlike both the voucher systems discussed elsewhere in this report and the other legislation reviewed here, however, it would provide no assistance to church-related schools.

All the other bills and acts reviewed here differ in several fundamental respects from the voucher systems we have described. They are designed to save the taxpayer money. None provides enough money to finance new or innovative schools. They are also designed to preserve the existing range of public and parochial alternatives, not to broaden it. Indeed, with the exception of the California legislation, we believe that the legislation reviewed here would have exactly opposite effects from the voucher system outlined in previous chapters. Most restrict aid to private schools whose staffing and program resemble the public schools in critical respects. They allow private schools to differ from public ones in two questionable respects. First, private schools would still be free to charge tuition even though they received public money. Indeed, private schools would have to charge tuition to survive economically. This means they would remain economically exclusive. Second, private schools would be free to exclude students whom they judged difficult to educate for one reason or another, forcing these children back into the public system.

Under these circumstances, it seems misguided to criticize vouchers for aiding church schools. Such aid is already being given, and it will continue to increase. The question is whether we can devise forms of aid which will encourage diversity in other schools as well as keeping church schools alive. The long-term effect of most present and proposed state legislation would be the creation of several separate systems, all financed from the public treasury, all with rather similar programs but differing in the kinds of pupils they included and excluded. This is precisely opposite from the voucher system we have proposed, which would prevent schools from being economically or socially exclusive but would give them great latitude in devising programs for the students who chose to enroll.

The remainder of this chapter reviews these bills and acts with respect to seven specific criteria: (1) the level of aid provided; (2) the degree to which the aid equalizes the purchasing power of rich and poor; (3) the degree to which the legislation would encourage uniformity rather than diversity of educational programs; (4) the amount of due process available to recipients of aid who believe they have been unfairly treated;

(5) the restrictions on discrimination in school admissions; (6) the extent to which parents would be made conscious that they had a choice among schools; (7) the amount of information that would be available to parents about these schools.

1. Levels of Aid

Only the California legislation reviewed provides enough aid to cover the cost of operating a school. The purpose of the other bills and acts is to save money by maintaining the present level of private expenditures on education. Per/pupil payment plans now in operation thus pay amounts ranging from $48 to $200 per pupil. Purchase of services agreements vary considerably in the percentage of teachers' salaries which may be paid by the state, but in no case does the payment cover the full cost of all teachers' salaries. Hawaii's maximum tax credit is $20 for persons with adjusted gross incomes under $3000. California's proposed voucher plan, on the other hand, would provide $1000 to parents of disadvantaged children.

The result is that only schools with access to church or private funds can survive. For those who do not seek religious education, the aid which is provided favors parents with incomes high enough to make substantial expenditures for private schooling. In this situation, the prospects for educational diversity are not encouraging. About 90% of the nation's private school pupils attend church-affiliated schools. Except for a small number of schools catering to the relatively affluent, these schools are the only ones which can depend on systematic private funding. Most parents, therefore, have only two basic choices -- the public system and the religious system. It is still possible, of course, for a parent to seek or to begin a different private school, but the low level of public aid available provides almost no opportunity to do so.

This bias in favor of church schools and relatively affluent individuals will not be alleviated by the approaches presently enacted or under consideration. It seems likely, in fact, that those who favor this limited aid will be able to maintain the economic and political leverage which was used to support the enactment of "parochiaid" legislation in the first place. The poor and middle-class, on the other hand, because they are not provided with a basic economic and political franchise for schooling, will not gain a substantial influence over the future of private schooling.

In addition, these plans further divide the electorate into those who have a vested interest in increased expenditures for public schools and those who would like to limit public school financing while maintaining a modest level of aid to private schools.

Were an educational voucher system to be adopted, providing for the financing of all schools (public and "private") through per capita vouchers equally available to all parents, the situation would be different. Every parent in that situation would have roughly equal economic bargaining power, and all parents would have the same vested interest in the level of public support for education.

2. Equalization

Connecticut has attempted through a percentage payment formula to put disadvantaged persons in a somewhat better bargaining position. Its aid statute provides a basic reimbursement of 20% of the salary of lay teachers teaching secular subjects. If the enrollment of the private school reaches 1/3 educationally disadvantaged children, the percentage of salary paid increases to 50%. At 2/3 educationally disadvantaged enrollment, the figure is 60%. Although this plan does provide an inducement to private schools to include disadvantaged children, it does not change the fundamental bargaining position of these children. They must still depend upon money contributed by the church or higher-income parents at the school to pay for their education because, although the aid for a disadvantaged child is greater than for a wealthy child, it is not great enough to pay his way. The education of these disadvantaged children, therefore, remains in the hands of schools with access to private funds.

An increase in the power of disadvantaged persons could also be achieved by paying the entire cost of salaries, as opposed to paying a flat grant which is less than total cost and, therefore, invites unequal supplementation by parents. No statute provides this, but Pennsylvania approaches it by paying the "actual cost" of teachers' salaries "not to exceed the minimum for public school teachers." Schools are still free to charge tuition in order to increase their total budgets, but at least there is sufficient money available that low-income persons could join in starting a school and maintain salaries without outside assistance. Pennsylvania makes it easier for disadvantaged parents to maintain their own schools; Connecticut provides an inducement for established schools to take in disadvantaged children. The power equalizing is incomplete in both cases.

Unfortunately, even this small equalizing benefit in the Pennsylvania statute is threatened by the reimbursement procedures of the act. Section 5607 provides that if in any fiscal year the amount of money in the fund which comes from horse-racing revenues is insufficient to cover the total validated requests of private schools, reimbursements shall be made in the proportion which the total amount bears to the total fund. This means that the amount a school gets will in reality be less than adequate to cover actual costs of salaries, and the poor person will be back where he was with the limited flat grant. The legislature remains in control of this decision through its power to set the percentage of horse-racing revenue allocated to the fund. Connecticut, on the other hand, provides payment procedures which ensure that -- up to a point -- claims based on the presence of disadvantaged children are honored first.

It is unclear whether more power equalizing is achieved by a percentage formula with a 60% maximum (Connecticut) or a flat grant formula (Pennsylvania) limited by pro-rata shares. What is clear is that neither gives independence and effective choice to low- and middle-income persons attending non-religious schools. The education vouchers proposed in Missouri, New Mexico, Wisconsin, and Illinois provide even less money than the Connecticut and Pennsylvania purchase of services agreements. Plans like Rhode Island's, which provides only a 15% salary reimbursement with no increasing percentage for enrollment of disadvantaged children, are even worse because they contain no inducement for private schools to enroll children of the poor.

Many purchase of service plans define "secular" services very narrowly. The Pennsylvania statute, for example, limits reimbursements to "mathematics, modern foreign languages, physical sciences, and physical education." In such cases, the total available aid is, of course, limited to a percentage of the total support needed to run a school. A narrow definition of "secular" may be viewed as helpful in avoiding First Amendment problems of aiding religious schools, but when it applies to non-religious private schools as well, the protection is unnecessary. The accompanying reductions of aid are also a distinct disadvantage to the poor. States which have broad definitions of secular subjects (such as Rhode Island, Connecticut, Wisconsin, Michigan) tend to give less advantage to religious schools and, therefore, to create more favorable conditions for diversity.

3. Diversity Versus Uniformity of Program

Diversity suffers a further setback because of the restrictions on recipients imposed by most of the various acts and bills. Ohio is one of the more painful examples, Its statute provides for a contract between a school district and lay teachers of those secular subjects which the state board requires in the non-public schools. To qualify for reimbursement, the teacher and school must comply with the following items:

1. Teachers must hold state certificates.
2. The State Superintendent of Public Instruction shall review courses, programs of student and teacher evaluation, and achievement tests from time to time.
3. "No services, materials, or programs shall be provided for pupils in non-public schools unless such services, materials, or programs are available for pupils in the public school district."
4. "...services, instructional materials, or programs provided for pupils attending non-public schools *shall not exceed in cost or quality* such services...as are provided for pupils in the public schools of the district." (emphasis added).

Not all statutes and bills are quite this overtly anti-competitive, but it is common to find provisions requiring teacher certification, approval of texts, satisfactory performance on standardized achievement tests, compliance with building and health regulations, and general equivalency with public school curriculum. Attendance requirements are the same as for public schools in almost all the states considered, and are generally set out in code sections separate from the aid statute or bill. In addition to these requirements, there are various accounting procedures and secularizing requirements designed to prevent violations of the First Amendment.

An additional problem with the aid plans of the various states surveyed is that they provide no assistance to parents or educators seeking to start new schools. Neither in the form of low cost capital loans nor technical assistance is any counterweight to the favoritism for established, parochial, and expensive schools provided. In fact, two of the plans require periods of up to three years before a new school may become eligible for aid (see the Connecticut and Illinois bills).

4. Due Process

In view of the fact that failure to comply with state requirements can result in denial or termination of substantial aid, it is disturbing that only Connecticut provides a notice and hearing procedure for schools which feel aggrieved by the decision of the state's chief education official. Connecticut's law provides a detailed mechanism for dealing with such grievances. In particular, it provides for written notices when aid is denied, written appeals for a hearing on the denial conducted by a hearing officer, representation by counsel, transcripts of hearings, written decisions, and appeal of decisions to the superior court of the state. The same procedure is required for suspension of aid for alleged violations of the statute.

Adequate procedural remedies seem especially important in those statutes which provide minimum requirements for the receipt of aid, but do not specifically say that,on meeting these requirements, the private school shall become "entitled" to aid. The Pennsylvania statute, for example, sets up a special fund for the purchase of services and mentions three "conditions for payment." It also states that the Superintendent of Public Instruction shall "establish rules and regulations pertaining" to payment. In addition to this general discretion, there is also discretion inherent in the vagueness of the conditions themselves -- such as that instructional materials shall be approved by the Superintendent.

It is not difficult, therefore, to imagine situations in which a school might feel that a decision rejecting its request was arbitrary or in excess of the authority granted by the statute. Unfortunately, where discretion is too wide, even a hearing procedure such as Connecticut's may provide protection in only the most grievous cases.

5. Discrimination in Admissions

The provisions of the statutes and bills preventing discrimination by schools on the basis of race, national origin, color,or other invidious grounds do not inspire confidence. Most require a certificate of compliance with Title VI of the Civil Rights Act of 1964. Only in Connecticut, however, is reference made to specific enforcement procedures. Although it may be expected that the Fourteenth Amendment will apply to any private school's receiving state aid directly, and perhaps even indirectly, the absence of specific standards and procedures for filing and disposing of discrimination complaints makes effective anti-discrimination action difficult.

Pennsylvania's statute makes no mention of discrimination, but the regulations issued by the state (see Q and A booklet Jan. 1969, #24) indicate that a state executive order prohibiting discrimination in state contracts by race, religion, age, sex,or national origin applies to the contracts for secular educational services. The regulations then go on to explain that a religious or denominationally affiliated school may "recognize the preference of parents" to have students of the same religion at the school. The legal status of this ruling is unclear.

Connecticut's act contains the only complete statement about discrimination. In addition to compliance with Title VI, the act requires open enrollment at all schools receiving aid. Open enrollment is defined as the "offer of admission to any qualified student meeting its academic and other reasonable admissions requirements...without regard for race, religion, creed or national origin. (section 3h)." In addition, the regulations (s. 10-281n-7(d))state that academic and other reasonable requirements shall "not be such as to result in a preference in admission to students on the basis of race, religion, creed or national origin." The state commissioner of education is empowered to give notice and hold hearings to suspend aid for any violation of the provisions of the act.

Unfortunately, there do seem to be loopholes in this set of provisions. The regulations state that preference may be given by a school to the children of parishioners or other regular contributors (except those who only pay tuition). The school need provide open enrollment only for the same percentage of places as the state aid represents of total operating cost. The additional provisions make it possible for schools attended by the children of well-to-do families to escape even their proportional requirement while still receiving 20% aid. The requirements relate to the "total operating cost" so that at an expensive school, the proportion of aid (20% of a minimum state average salary e.g.) will be lower than at a school which pays lower salaries and spends less on other operating costs. In addition, the regulations are based on the "total number of students admitted," but a parent is allowed to exclude his child from such a count. A well-to-do parent can afford to exclude his child from the pupil count thereby increasing the percentage of disadvantaged children enrolled, increasing the percentage of aid to the school and decreasing the "total" enrollment of the school. As a result, the number of open enrollment places required drops.

6. Effectiveness of Parental Choice

Aid in the form of purchase of secular services works against effective parental choice. To begin with, the teacher or school usually receives the aid on the basis of expenditures, without regard to the number or type of children served. This means that a school has no incentive to enroll additional children. As long as some children attend, the teacher receives a part of his salary from the state. Unless large enough numbers of children withdraw to require a reduction in staff, the choice of the parent thus has almost no effect on school finances. The power of parent choice -- and the force of competition -- is diminished. (Connecticut is an exception to this rule. It gives bonuses for enrolling certain students and limits the pupil/teacher ratio to 25 students per teacher.)

A second and more subtle dilution of parental choice is the fact that parents are not given concrete evidence of their power to affect school financing. Parental choice does not alter the flow of aid very much in purchase of service arrangements; but even if aid of this sort were calculated on a per capita basis, the parent would not clearly see that his choice had an actual effect on whether or not the school was aided. Most parents, especially low-income parents, are accustomed to believing that it is they who need the school, not the school which needs them. Without some tangible evidence of the power to choose, therefore, there may be much less bargaining between the parties.

The California bill does not suffer from this flaw. According to its terms, a school in an economically disadvantaged area which falls below certain minimum performance standards prescribed by the Director of Compensatory Education becomes a "demonstration school." The parents of children attending the school become entitled to certain alternative choices and receive a tuition voucher valued at $1000. The Director must inform all parents of their eligibility to receive such vouchers, which are negotiable at any approved "provider of educational services." This plan solves both choice problems previously mentioned because it calculates aid per capita and provides parents with a concrete "negotiable" instrument. In addition, the amount of the voucher seems sufficient in itself to pay the costs of at least some schools, and the aid is delivered only to disadvantaged areas.

Several other bills presently under consideration by state legislatures would provide some evidence of aid directly to the parent. Missouri Senate Bill 375 (1969) and Iowa House Bill 571 (1969) reimburse the parent directly for money he pays to a private school under certain conditions. Wisconsin Senate Bill 346 (which passed the Senate this year but will not be considered in the House until 1971), does not specify the actual form of aid delivered but does provide for "grants to resident parents." Illinois House Bill 2350(which passed the House in 1969 but was killed in the Senate in June), would deliver to each qualified school "educational opportunity grants" at the end of the year. Grants would be paid for according to warrants which parents had executed and given to the school at the beginning of the year. Although these bills would provide both per capita aid and visible evidence of power to parents, unfortunately none of them provide enough money to make parental choice effective except in those schools which need only small additions to their private sources of funds.

7. Information for Parents

Effective parental choice is also limited by the failure of all proposals to prescribe means for providing parents with adequate information regarding the schools available to them. In a situation in which new alternatives exist for parents, the provision of information about "products" is essential. Although considerable uniformity of schools may be imposed by the regulations in much of the legislation, it is nonetheless important for parents to make informed choices regarding those aspects of education which do vary. On this subject, the legislation reviewed is almost completely silent. Even the requirements that standardized testing be conducted at schools receiving aid is not accompanied by a requirement that this limited performance evaluation be made readily available to the public. There is no requirement that all parents be informed of the qualifications of teachers, the type of program, the budget, the philosophy, or the past performance of the available schools aided by tax monies. This omission seems to reflect an unwillingness to encourage increased parent selectivity and interschool competition as well as reluctance to tell all parents that they have alternatives to public education.

Advantages of a Voucher System

Many of the objections raised in this chapter to "purchase of services" and "mini-voucher" systems would be avoided under our proposed voucher system:

1. If the voucher covers the full cost of education, non-public schools will not be forced to rely on financial support from religious organizations or affluent parents. Lower-and middle-class parents would, therefore, have genuine choices available to them. New, diverse non-public schools would be more likely to arise since their operating costs could be fully covered by voucher payments.
2. Under our preferred economic model, the vouchers of disadvantaged children would be worth more than those of advantaged children. This should induce non-public schools to enroll low-income children and would make the bargaining power of the poor more nearly equal to that of the middle class.
3. Our proposed admissions procedures would discourage discrimination on the part of schools in two ways: (a) the EVA would have the power to investigate complaints and to invoke sanctions against schools which practiced racial discrimination; (b) admissions to a school would be partially determined by lottery. This would give parents some assurance their children were being treated fairly by the schools to which they applied.

4. Vouchers would be given directly to parents, providing them with tangible proof of their power to choose a school for their children. Moreover, the EVA would be required to provide enough information to parents that they could make an effective choice among alternatives.

Many of the advantages of our voucher plan would, of course, be eliminated if the state legislators or local EVA's imposed unnecessary restrictions on voucher schools.

The Supreme Court has recognized that "the fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."[2] But such standardization could also result if non-public schools were required to serve the same ends or to use the same approaches as public schools. Diversity in schools therefore must be not only tolerated but actively supported.

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[2] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

5. The Demonstration Project[1]: Specifications and Evaluation

This chapter proposes specifications for a meaningful experiment with education vouchers. These specifications are derived in part from the preceding discussion and in part from arguments outlined here. The effects that these specifications would have on both the form of the demonstration and the ease of evaluating its success or failure will be apparent. The first section of the chapter describes general specifications for a demonstration; the second section outlines the evaluation mechanisms which we believe would make it possible to judge the relative success or failure of the demonstration with some confidence.

Specifications

Duration

1. The demonstration should continue for a minimum of five years and probably should last for eight years.

Parents in the demonstration should be convinced of the relative stability of the voucher program. Although sophisticated parents will realize that the Federal government cannot guarantee that money will be available for more than one year, some public commitments should be made to ensure at least minimum consumer confidence.

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[1] In the text we use the terms "demonstration," "project," and "experiment" interchangeably. We generally employ the singular form, although as the text makes clear, we do recommend that more than one area be used for demonstration purposes.

A demonstration of less than five years would discourage applications for admission to schools other than those run by the board of education. Parents would consider it too much bother to transfer children both into and then out of an elementary school. Further, parents might believe that their children would be harmed by changing schools too often.

Moreover, commitment to less than five years would make it extraordinarily difficult to establish new schools. Even if there were adequate funds to cover initial starting costs, and experts available for advising would-be school founders on how to get started, the task of finding a building, personnel, and clients for a short-lived operation would put off all but the hardiest reformers and businessmen. Because it would take several years for new schools to establish themselves and build reputations, it would be several years before parents could make intelligent choices among new schools. If, at that point, the new schools were already phasing out of existence, no real tests of parental preferences would be possible.

Although five years is the minimum acceptable project length, eight years would be preferable. At the beginning of the demonstration period parents would need time to become familiar with their alternatives. Toward the end of the demonstration, parents would be naturally reluctant to enroll their child in a school which might not exist in one or two years. Eight years would ensure full participation for at least one complete "class" of students. We estimate that a demonstration longer than eight years would yield only slight gains in information. Hopefully, the effects would be large and unambiguous. In that case they should be evident after eight years. If the effects were small, the correct strategy would be replication, not extension.

2. There should be a planning period of at least one year preceding the demonstration.

A variety of tasks would be required before the demonstration begins. Political machinery responsive to the interests of the parents in the area should be established to control the experiment. Specifically, mechanisms for distributing and redeeming vouchers should be arranged. An information gathering and disseminating agency should be established to collect information about participating schools and to ensure that all parents have access to that information. Educators and parents should be given time to organize and to establish new schools. Time would be required for building or remodeling, hiring staff, and attracting students. Finally, the organizations carrying out evaluations should be given time to collect preliminary information.

Location

Every effort should be made to have more than one demonstration site. There is no substitute for even a partial replication. Whatever the number of sites, certain criteria are relevant for each.

1. If possible the demonstration should be carried out in an area with a population that is heterogenous with regard to social class and race. Such an area would be desired for two reasons.

First, unless vouchers were available to both black and white children and to both rich and poor children, the effect of a voucher system on segregation by race and class could not be tested.

Second, the greater the heterogeneity of the population, the more diverse the demand for schools would be and the greater the range of choices for individual parents.

2. The demonstration area should be confined to the boundaries of a single municipality.

For one thing, the task of negotiating with more than one school district or municipal government seems impossibly complex. In addition, the impact of the program on local politics, while difficult to appraise under any circumstances, would be easier to appraise if a single municipality, or a self-conscious, self-defined area within a large city, were covered.

3. Because alternative schools might be difficult to establish even in an eight year period, demonstration should probably be located in an area where a number of existing private schools were willing to become voucher schools for the duration of the project. In this way, some assessment of parental choice would be assured. Further, the prior existence of alternative schools is an indication that parents would be interested in such options.

Eligibility of Pupils

1. The demonstration should include only kindergarten through sixth-grade pupils.

Many people believe that the early years of a child's education are the most crucial in determining what he will eventually achieve or become. Perhaps because of this, parents seem to be most concerned about the quality of education received by their children when they are young. They are, therefore, likely to be more willing to accept the responsibility of choosing schools implicit in a voucher program at the elementary level.

In addition, the costs of elementary schools are less than those of secondary schools. Assuming limited funds, a demonstration project confined to elementary schools would therefore reach more students. Moreover, elementary schools are easier to set up than secondary schools. Accreditation requirements and the need for special facilities are less extensive. Elementary schools are generally smaller than secondary schools. Both these points suggest that more schools would be established in a limited demonstration if secondary schools were excluded.

2. All children of appropriate age in the demonstration area should be eligible for vouchers. A random or stratified random sample of children within the demonstration area does not seem politically possible.

Type of Voucher

The compensatory formulae for determining the value of vouchers and levels of tuition described in Chapter 2 should be used in the demonstration. No voucher schools should be allowed to charge tuition over and above the value of the vouchers. Pupils attending parochial voucher schools should receive vouchers worth no more than the cost of their secular education. All schools should be eligible for compensatory funds if they enroll disadvantaged students.

Admissions Procedure

The discussion of admission procedures in Chapter 3 applies to a demonstration as well as to a large-scale project.

1. Voucher schools should be allowed to fill a limited number or percentage of their places in any way they see fit.

This percentage, although it should be no more than half, should be large enough to ensure that children of parents who helped establish a school would be admitted, as would pupils with siblings already in a school. We also believe that schools should be able to select certain pupils according to non-discriminatory criteria based on educational objectives.

2. Voucher schools should be required to fill at least half their places by a lottery among applicants. A lottery seems to be a practical system for ensuring that voucher schools take their share of "difficult" children. It is also important that parents perceive that their children have an equal chance. Many parents now assume that their children have no chance of getting into a selective school, and therefore do not bother to apply. If significant numbers of places were known to be distributed by lot, more disadvantaged parents might apply to such schools.

3. Children should not be arbitrarily expelled from a school during the school year. Appropriate mechanisms are outlined in Chapter 3. The suggested procedures include a review board to ensure that pupils are guaranteed due process rights, and economic incentives to schools to keep students.

Mechanisms For Aiding Parental Choice

An agency should be set up to collect information about schools and to distribute this information to parents. All schools participating in the demonstration should be required to make this information available. The information-gathering agency should collect and validate two types of information on a continuing basis throughout the demonstration. First, certain common information should be collected from all schools participating in the demonstration. This information probably would include descriptive characteristics of the school (size, pupil/staff ratio, racial and social class composition, age of building, etc.). It might also include some objective measures of pupil performance (test scores). The nature of this information should be determined by the agency administering the experiment by taking into account: (a) the information desired by parents, which should be made available to the public, and (b) the information desired solely by OEO, which could be confidential.

A school should also be able to define its own criteria of "quality" or success (tests of musical or artistic performance, data about special extra-curricular activities) and request the information-gathering agency to verify this data and include it in publications about the school. The information-dispensing agency should devise ways, probably involving personal contact, to make all collected information available and understandable to all parents in the demonstration.

Administration

Some agency should have overall responsibility for administering the voucher plan. This education voucher agency (EVA) should be representative of the community. Its particular form would depend on the nature of the site chosen for the experiment. Above all, it should have legitimacy in the eyes of the parents and educators. It would have two basic functions:

-- It would have overall fiscal authority. This would include overseeing the administration of vouchers to all parents. It would also include allocating funds to the information collecting and dispensing agencies, to the review board and to any other agency set up for the demonstration, and allocating funds for starting costs to new schools, and for transportation costs to all students in the demonstration requiring such funds. Last, it should redeem vouchers and distribute funds to eligible schools. In addition, it might wish to fund its own local evaluation effort. OEO's overall evaluation should, however, be funded directly by OEO.

-- *It would have authority to make necessary administrative decisions*. It would have final authority over each of the agencies to which it allocates funds. It would also certify schools for participation in the demonstration. This is likely to be a complicated problem. Guidelines for certification should be established. Participating schools should accept a voucher as full payment of tuition. They should agree to a lottery system if they are over-applied. They should agree to the decisions of the review board on expulsions. Aside from these requirements, schools would presumably have to meet the established state and local criteria for accreditation with regard to building codes, teacher certification, curriculum, etc. *We strongly recommend that the EVA obtain waivers of unnecessarily restrictive state and local education regulations.* The reason is clear. If extensive curriculum and teacher certification requirements were imposed on every participating school, the trend would be toward uniformity rather than diversity. This would discourage innovative schools and would reduce the overall level of choice available to parents.

Costs

It is impossible to estimate the cost of a demonstration project with any accuracy before selecting a site, contacting existing schools, and surveying the likely choices of parents in the area. For illustrative purposes, however, let us make the following assumptions:

1. In order to find out very much about parental choices and the character of the "education market in one area," we would need at least 10 privately controlled secular voucher schools, several parochial voucher schools, and several neighborhood public schools. This mix would allow the development of genuine competition and "product differentiation," and would test the capacity of parents to discriminate between a fairly wide variety of alternatives. If the average voucher school enrolled 200 children, 2,000 families would need to be willing to remove their children from public or parochial school for the experiment.
2. In order to obtain 2,000 families interested in such schools, we assume that we would need an area in which there were at least 12,000 children between 5 and 11 years old. We assume, in other words, that about a sixth of the population would choose privately controlled voucher schools under the ground rules we have proposed. This figure is arbitrary but enables us to develop rough estimates.
3. Let us suppose that the area were 30% Catholic. Assume further that 1/3 of the Catholics in the area would attend public school, and 2/3 parochial schools, all of which would elect to become voucher schools in order to cash vouchers.
4. Let us assume that the basic voucher were set at $750 per child. Assume also that "compensatory" payments for low-income children began when the parents' income falls below the national median, and that such payments rose to a maximum of $750. Let us assume that two-thirds of the demonstration area children were from families with below-average incomes,

and that they carried an average compensatory payment of $300 per child. This would make the average expenditure in the demonstration area $950 per pupil. If 12,000 pupils were covered, the overall annual expenditure in the area would be $11.4 million.

5. Let us assume that per pupil expenditure in the public schools at the beginning of the experiment were $500 per pupil, and that 80 percent of the children in the area were in public schools at the beginning of the demonstration. The public schools are thus presumed to be spending $4.8 million at the beginning of the experiment. They would be required to commit themselves to maintaining this level of effort.
6. Let us assume that parochial schools would not be entitled to a full voucher because their audited expenditures for secular purposes (exclusive of compensatory benefits) come to only $500 per pupil rather than $750. This would save $250 apiece for some 2400 children, reducing the original $11.4 estimate by $600,000 to $10.8 million.
7. The overall cost of the school programs being $10.8 million, and the local contribution being $4.8 million, the cost to OEO would be $6.0 million, plus administration, evaluation, planning, etc., per year.

It must be recognized that these estimates are very rough. Different assumptions would have great influence on the estimates. Also, we must assume that costs would rise steadily from year to year.

Summary

We have sketched some initial specifications for an OEO voucher project. We suggest that wherever possible, a demonstration should follow the guidelines set out in the previous chapters for a large-scale project. We therefore argue for a compensatory voucher program, for a partial lottery for admissions, and for mechanisms aiding parental choice. In addition, we recommend that a demonstration continue for a minimum of five and preferably eight years; that it be located in an area heterogeneous with respect to social class and race and within the boundaries of a single municipality; and that only elementary school children be eligible for vouchers. We estimate that a demonstration area should include about 12,000 eligible children. We estimate the annual costs to OEO of such a demonstration would be in the range of $6 to $8 million.

In addition, we have set out a very tentative administrative structure. But we anticipate that this would be modified once a site had been selected.

Evaluation

An evaluation of a voucher demonstration project should include three components:

- A political and educational history of the demonstration,
- An evaluation of the specific objectives of the program, and
- An assessment of criticisms of the voucher plan.

This section suggests criteria, mechanisms, and designs for carrying out these three tasks.

1. General Recommendations

-- An OEO demonstration project might become the model for future large-scale voucher projects. This suggests that mechanisms for the demonstration should be similar to those regarded as desirable for future projects. It should be recognized, however, that it might be easier to ensure equal opportunities for poor parents in an OEO demonstration than in a large-scale system. The proposed mechanisms for establishing equal choice and access to schools (i.e., restrictions on tuition, a lottery to allocate scarce places, compensatory grants, and an efficient information gathering and dispensing agency) may be less important to legislators than to OEO, and therefore might be abandoned entirely in a non-OEO project. It might also be easier to get temporary suspensions of building codes, certification requirements, and the like for a demonstration project than for permanent legislation. Nonetheless, a demonstration should try to demonstrate what ought to be done, rather than being a prototype of what is most likely to be done. If any other approach were followed there would be little likelihood of evaluating the full potential of a voucher system.

-- Any demonstration would be idiosyncratic. The political climate, the racial, ethnic, and social class mix of the area, the number of available alternative schools, and the amount of dissatisfaction with the public schools would all affect the findings of an evaluation. Great care must therefore be taken in making inferences from the results of any one demonstration. It is unlikely that the results would be the same in a permanent, large-scale project, even if it were carried out in the same area. This suggests that more than one demonstration area should be funded.

-- Any single evaluation of a demonstration would have certain shortcomings. Evaluators, no matter how hard they try, must still make somewhat arbitrary decisions about which objectives they examine, and what methods of evaluation they use. OEO should, therefore, retain several groups of evaluators. Each group should independently define objectives and the way they are to be evaluated. At least one of the evaluation groups should be particularly responsive to the interests of the parents. None should be fiscally dependent on the agency administering the project.

-- Even if these recommendations were followed, a demonstration might appear more conclusive than it really is. Claims of what it proves about any particular issue, therefore, should be kept to a minimum.

2. Monitoring the Political and Educational History and Consequences of the Demonstration

July 1970 - August 1971 - The Planning Year

Political conflict might be great. Many groups would be attracted by the Federal and state monies available for the demonstration. Each group might have its own ideas about the desirable form of demonstration. Though political pressures might force the abandonment of the recommended voucher plan during the planning year, it is more likely that compromises in the structure of the demonstration would be reached to appease powerful groups. An analysis of the political situation during this period would be critical for an understanding of what people expect, want, and will get from a tuition plan. If the demonstration were seriously altered or terminated prematurely, this analysis might suggest why and how to establish a new demonstration in another location.

Other data also should be available to evaluators. People would want to start new schools, to decide whether to send their children to alternative schools in the following year, and to understand the implications of the "new" scheme. The information collecting and dispensing agencies should set up early in the "planning" year, and should keep complete records. These records should be available to evaluators as baseline data for the overall evaluation.

September 1971 - June 1980 - During and After the Demonstration

During this period similar evaluations should be carried out. A political history should be kept and descriptive information gathered about the demonstration. To a large extent the information gathered by the information-collecting agency should suffice. As the demonstration progressed a number of potential problems could be examined.

- The admissions mechanism could be examined. By the second year of the demonstration, the evaluators should begin to be able to estimate the importance of over-application to specific schools and the overall effect of the lottery mechanism on parental choice, levels of enrollment, segregation, etc.
- The economic model could be examined. Again early in the demonstration evaluators should be able to estimate the equalizing effect of the "compensatory" model on the services children receive in schools.
- The adequacy of the information collecting and dispersal agencies could be examined. Early in the project there should be some indication as to the overall effectiveness of the mechanisms in making pertinent information available to all parents.

These evaluations should have a feedback effect on the demonstration. If they suggested that the agencies were not performing efficiently, it would seem reasonable to alert people and to attempt to correct performance. This path, however, should be taken with caution. Preliminary indications of a problem might be misleading and corrective measures, therefore, inappropriate. Further, substantial tinkering would complicate the already difficult business of generalizing from the results of the demonstration to other voucher projects. We think, however, that a demonstration of the voucher project should attempt to set an "ideal." The benefits of such corrective measures then should generally outweigh possible costs in generality. It should be noted that the amount of "corrective" action required to keep the agencies performing efficiently would in itself be an important subject for evaluation.

The effects of the voucher plan on parts of the education system other than parents and students should also be examined. An analysis of the attempts to establish new schools should be made. The role of teachers' professional organizations in the history of the demonstration should be analyzed. Some estimate should be made of the effect of the plan on the salaries, turnover rate, and attitudes of teachers in the demonstration area.

Finally, the introduction of a new scheme for financing schools would have effects reaching beyond the schools. If parental feelings of efficacy were increased, this might be reflected in higher registration and voting rates. Local political candidates might have to take a stand one way or another on the value of the voucher scheme. Financial incentives tested in a demonstration might create opportunities for new political alignments. Assessment of these changes would be valuable in estimating the overall impact of the voucher scheme.

In summary, there should be a descriptive and historical component in the evaluation of the demonstration. Although this is not a typical evaluation function, special circumstances demand it. To many, the demonstration would be considered a "success" when the first voucher was administered. Yet, until the demonstration was operating, no amount of talking or writing would convince people either that a voucher scheme was feasible, or that it would create outcomes different from those of the present system. Even when the demonstration was going, there would be little hope of accurately evaluating its influence unless careful attention was paid to its effects on the surrounding environment.

3. Evaluation of Specific Objectives of the Demonstration

An evaluation should assess the success of a voucher demonstration in reaching the two stated objectives:

-- A voucher system should improve the education of children, particularly disadvantaged children.

-- A voucher system should give parents more control over the kinds of schooling that their children receive, particularly the parents of disadvantaged children.

Two general strategies could be used to assess these objectives (which were discussed in detail in Chapter 1). The first might be labeled the "black box" approach. Measures of the quality of education available in the demonstration area could be taken before, during and after the demonstration. The problem with this approach is that it would not show whether or not the voucher scheme itself influenced the outcomes. We would not know, for example, whether the situation would have changed without the voucher scheme, whether the reason for change was the experimental nature of the program, or whether the increase in expenditures for education was the cause of change.

This second strategy involves testing the validity of the assumptions underlying the argument that the voucher plan would lead to improved education and greater parental control. If the assumptions were found to be valid, we would have some assurance that the plan, rather than the circumstances surrounding the demonstration, was causing any changes. We suggest using the second strategy. It requires gathering additional data and greater expense than the "black box" approach, but we think the advantages outweigh the costs.

The arguments for the voucher plan rest on three assumptions which should be evaluated:

(1) A voucher scheme would lead to a greater diversity of educational alternatives.

(2) Poor parents, given financial resources and insured equitable admissions treatment, would be able to exercise greater choice among the alternatives, thereby requiring the schools to be more responsive to their children's needs. This should result in parents' having greater control over the education that their children receive.

(3) The diversity of educational alternatives and the increased responsiveness of schools to children's needs would lead to improved education, particularly for poor children.

(1) A voucher model would lead to a greater diversity in education.

There are three possible sources of diversity. First, given freedom and financial resources, educators might create large numbers of schools that are significantly different from those now operated by local boards of education. Second, through the exercise of choice, parents might force schools to be more responsive (accountable) to their particular interests, thereby increasing diversity. Third, the decentralization of fiscal control might increase the number of administrators making decisions and, therefore, potentially increase diversity.

In the evaluation, it would be important first to consider whether the voucher scheme increased diversity, then the sources of the increase could be investigated. Three categories for assessing diversity seem helpful:

- Diversity in conventional inputs, e.g., adult/pupil ratio, qualifications of teachers, characteristics of student body, age and nature of building and equipment, curriculum characteristics.
- Diversity in the objectives of schools: Do they focus on the three R's? on "learning to learn"? on music? on discipline?
- Diversity in the outputs of schools: Do some schools teach math better than others? Do some schools produce better informed citizens?

A distinction can be made between "perceived" and "real" diversity. Either might occur without the other. That is, parents and educators might "perceive" that the voucher scheme had spawned diverse schools without "objective" measurement finding the diversity and vice versa. Both types of diversity are important. "Perceived" diversity can lead to "perceived" choice, which in turn might lead to parents' feelings of greater control over their environment; "real" diversity might lead to greater choice and, therefore, greater control. The measurement of "perceived" diversity is relatively straightforward. Ways in which schools might differ should be detailed. Parents, educators, and other interested persons should be asked which differences were apparent and whether the new scheme was in part responsible for them.

The measurement of "real" diversity is somewhat more difficult. Although there is a large body of literature dealing with the problem, most previous attempts have been inadequate. Nevertheless, it would be important to obtain objective measures of the three categories suggested above.

Assessment of the three sources of "real" diversity does, however, present problems.

In the demonstration project, it would be important to assess whether the market structure of the voucher scheme would encourage educators to set up new and different schools. As noted earlier, the limited duration of the demonstration would discourage many innovators from starting schools. Specifically, educators starting new schools would need to consider what to do when the demonstration was over; they would have to take into account the large starting costs of new schools; and they would have to consider the problems in building a reputation for the school in a short time. For these reasons, extensive aid should be given to help the development of new schools. Thus, although it would be possible in a demonstration to determine whether the new schools were different from the old, it would be impossible to assess whether educators would set up new and different schools in a larger-scale project.

The second potential source of "real" diversity might be easier to examine in the demonstration because the responsiveness of schools to the wishes of the parents probably would not be greatly influenced by the fact that a demonstration was limited in duration and scope. The measurement problem would be, however, nonetheless difficult.

Multiple measures of schools' responsiveness should be made. A school might be responsive either to the wishes of individual parents or to the collective wishes of parents with regard to hiring and firing of teachers, to curriculum introduction and modification, etc. A number of control groups should be used for comparison purposes. Specifically, at least three sets of comparisons should be made. The responsiveness of schools in the voucher area during the demonstration should be compared (a) to the responsiveness of the schools in the area prior to the demonstration; (b) to the responsiveness of the schools in a nearby and similar non-voucher area; (c) to the responsiveness of schools in an area where decentralization legislation is just going into effect. Furthermore, the schools in the voucher area should be divided into "old" and "new", publicly and privately controlled, etc., for comparisons with the control schools.

The third possible source of "real" diversity is, in part, a given. That is, because financial control would be decentralized, there would probably be greater diversity than before in certain decisions: e.g., teacher salaries, textbook purchases, amount of time devoted to certain curriculum matters. Judging just how much of the overall diversity is due to fiscal decentralization, however, might be very difficult.

In summary, it does not appear possible in a demonstration of limited duration to test the proposition that new schools would automatically spring up in reaction to the new buying power of parents. It would be possible, however, to examine whether the "new" schools that did arise differed significantly from the old schools. This would be itself a partial test of whether parents had more choice. It would then be possible to examine whether parents were aware of the available choices and whether they reacted to the choices. It should also be possible to assess whether schools in the demonstration were more responsive to parental pressure.

Finally, it might be possible to assess whether decentralization of fiscal control led to greater diversity of schools. There would be, however, great problems in considering each of these issues -- perhaps the greatest being the definition of diversity and thereby the definition of choice.

(2) Parents would have more choice about the education that their children receive. This would lead to parents having greater control.

The second argument has two parts. First is that the voucher plan would extend to all parents, rather than just the rich, the opportunity to send their children to alternative schools. This would allow parents both actually to place their children in new or different schools and to threaten to place their children in new and different schools. Therefore, both the old and the new schools would have an incentive to be more responsive to the wishes of the parents. The second part of the argument is that parents would exercise their choice in such a way as to obtain greater control over their children's education.

Unless choice exists, there is no reason to believe that the schools would be more responsive to the needs of the child and certainly no reason to think that parents could exercise choice. The economic model, the admission mechanism, the information collecting and dispensing agencies, and the review board were all designed to encourage "real" choice.

Real choice for parents can be presumed to exist if:

-- Real diversity exists.

-- Everyone can afford alternative schools. The guidelines in our preferred model are designed to accomplish this, but there is no guarantee that they would succeed. If other economic models were used, or the value of the voucher were set too low, the poor might not be any better off than they are in the present system.

Choice, however, would not lead to greater control on the part of parents unless two further conditions were present. First, parents would have to realize that they had a choice and would have to be prepared to use it, both individually and in groups. (The extent of parents' "perception" of choice and of their willingness to exercise their choice, therefore, should be measured.) Second, teachers and principals would have to be aware that parents could and would choose different schools. Otherwise they would have no incentive to be responsive to the wishes of the parents. (Some assessment of teachers' and principals' perceptions, therefore, also should be made.)

Evaluating these issues might take great ingenuity. The task, however, would be necessary if the effects of the voucher scheme were to be estimated. In order to attribute changes in the quality of education to the establishment of a voucher plan, we would have to be able to demonstrate that diversity of educational alternatives led to parental choice, which in turn led to increased parental control and increased school responsiveness to the needs of children.

(3) Children, particularly poor children, would receive improved education.

Improvement presumably would occur because parents would be able to choose from a range of alternatives, and could, therefore, either select more appropriate schools for their children or force their present schools to be more responsive to the needs of their children. Before we could relate diversity in choice and parental control to improved education, however, some way of measuring "improved" education would have to be developed.

One way of measuring improved education would be simply to ask parents and children whether things had gotten better. The response of various types of parents could be contrasted and control groups set up, tested, and studied. Teachers and principals could be similarly questioned.

It is unlikely, however, that this would be entirely satisfactory. Everyone likes to think that objective measures tell us more than subjective perceptions. To "objectively" examine the question of "improved" education, however, would require that some prior value judgments be reached as to what was "improved" education. This suggests, as we noted earlier, that multiple evaluations are important and that the judgments of each evaluator should be made as independently as possible.

Presumably, multiple evaluations would lead to the collection of large amounts of data. Although the evaluators would be independent, attempts should be made to reduce duplication and bother to parents, students, and school personnel.

The analysis of school quality should not be limited to a study of conventional measures of inputs and standardized tests of achievement. The longitudinal nature of the project would allow for a much more detailed and comprehensive approach. Specifically, samples of students might be systematically followed throughout their school years. Measures might be taken of their early achievement and ability, and data gathered on their home environments and on their school experience. These measures could be related to the later achievement of the students, to their admission to high school or college, to their completion or withdrawal from high school, to their attitudes and aspirations.

Many problems, of course, would remain. Specifically, parents would have exercised their choice of schools, thereby mingling the effects of schools with the effects of choice. Some schools might not wish to divulge certain information. The sample size would be small, at least in comparison to some recent surveys. Control groups might not be comparable in certain ways. Finally, the experimental nature of the demonstration might have unexpected effects on the students, the parents, and the schools. Nonetheless, the suggested data should provide an adequate base for estimating changes in the quality of education.

4. Assessment of Criticisms of the Voucher Plan

Three particular aspects of a voucher demonstration should be reviewed:

-- The effects of the demonstration on segregation by race, social class and ability should be assessed. This assessment could be made without collecting data beyond that already suggested. The extent of each type of segregation among schools before, during, and after the demonstration could be measured. These measures could be compared to each other and to comparable measures gathered in control locations. All of this is relatively straightforward. Difficulties would arise if subjective criteria were applied.

- The effect of the voucher plan on church/state relations might be easier to examine in a demonstration. In the context of the demonstration, suits holding that the voucher plan was unconstitutional might be brought before the courts. If the courts were to decide to hear the cases, much of the ambiguity presently surrounding the constitutionality of the plan might be removed. Of course, information should also be gathered about the effects of the plan on parochial schools.
- The effects of the voucher scheme on the allocation of resources within a single school district could also be examined without collecting data beyond that already suggested. No estimate, however, of the effects of the plan on resource allocation over a large area would be possible.

Summary

Three general evaluation tasks have been proposed. First, a political and educational history of the demonstration should be maintained. The history should include an analysis of the political pressures for and against the voucher plan. It should also include information about the effectiveness of the mechanisms proposed for admission to schools, for the distribution of vouchers, and for the collection and dissemination of information. We suggest that this latter information should be used as feedback to the demonstration. If agencies were not performing adequately, they should be so informed, and their performance corrected.

Second, the evaluation should test the success of a demonstration in reaching two objectives:

- A voucher scheme would improve the education of children, particularly disadvantaged children.

-- A voucher scheme would give parents more control over the kinds of schooling that their children receive, particularly parents of disadvantaged children.

Although the demonstration would not provide definitive answers to these hypotheses, we argue that analyses of the assumptions underlying them would indicate the probable effects that the voucher plan had on school quality and parental control.

Third, an assessment of the principal criticisms of the voucher scheme should be carried out. Specifically, the effects of the voucher plan on segregation by race, social class, and ability, on church-state relations, and on resource allocation in the demonstration area should be monitored. The results of these analyses should not, however, be automatically generalized

Introduction to Section II

Chapter 6 deals with the three alternative approaches to vouchers which have come up most often in discussion with educators, legislators, and community groups. Part A discusses a system in which vouchers are available only to public schools managed by the local board of education. Part B deals with a system in which vouchers are available only for children whose parents opt out of the public school system. Part C discusses a voucher system in which only the poor are eligible for vouchers. Part D discusses a less fundamental change, in which vouchers are restricted to non-profit schools.

Chapter 7 deals with the technical problems of determining the value of vouchers for particular students, assuming vouchers vary in value according to educational "need".

Chapter 8 examines several of the problems in matching pupils to schools in more detail than did Chapter 3 in Section I. Part A takes up the prevention of segregation. Part B discusses the need for excess capacity in a voucher system. Parts C and D consider late applicants and running a lottery.

Chapter 9 focuses on problems unique to a demonstration. Part A considers problems of phasing into a voucher system. Part B reviews the financial consequences of a demonstration for the public schools. Part C looks at schools that want to fill only a fraction of their places with voucher students. Part D looks at financial arrangements with parochial schools, while Part E examines several alternative structures for an EVA.

6. Four Additional Economic Models

A. Vouchers Confined to Public Schools

One of the most common criticisms of the voucher system proposed in Section I is that it makes public money available to privately managed schools. Some object to this on constitutional grounds, fearing that it will break down the wall that is supposed to separate state and church. Some object on ideological grounds, fearing that it will result in the creation of large numbers of second-rate profit-seeking schools. Some object on administrative grounds, arguing that it would be much simpler to plan and operate a voucher system if parents' choices were confined to the public sector.

Section I suggested that the distinction between the "public" and "private" sectors would be very different under a voucher system than under the present system of school finance. Privately managed schools which chose to participate in the voucher system would not only receive public money, but would also be subject to public regulation. Specifically, they would have to open their doors to all races, income strata, and levels of ability, in a way that private schools have seldom been willing or able to do in the past. Nonetheless, privately managed voucher schools would still differ in some important ways from publicly managed voucher schools, and a system which excluded privately managed schools would certainly differ in important respects from the system advocated in Section I.

A voucher system which was confined to the public sector might take one of two forms. In its simplest form, the board of education and the superintendent would undertake to develop a variety of "alternative schools" in the public sector. These schools would exist alongside a network of neighborhood schools operated along more or less traditional lines. Parents would be free to enroll their children either in an "alternative school," if they found the program of such a school attractive, or in the neighborhood school. The "voucher system" would simply be a bureaucratic mechanism for allocating money among alternative schools and neighborhood schools on an equitable basis.

A second kind of voucher system confined to the public sector would involve "alternative schools" managed by private groups under contracts with the board of education. In such a system the local board of education would retain ultimate control of program, but would contract with universities, private corporations, community groups, or others to run innovative programs of various types. As in the first version, alternatives would exist alongside a network of traditional neighborhood schools. Parents would have a choice between enrolling their children in the new alternative schools or the traditional neighborhood schools. Again, the "voucher system" would be a mechanism for allocating funds among various schools on an equitable basis.

As usually conceived, both these models differ in one critical respect from the voucher system proposed in Section I. They both allow the Board of Education (or its administrative staff) discretion in determining what kinds of innovation should receive public subsidy and what kinds should not. Both models are therefore attractive to many professional educators, and unattractive to many who distrust the educational profession.

The voucher system proposed in Section I would allow the EVA to regulate the kinds of schools eligible for public subsidy. But the EVA's criteria for determining eligibility would have to be explicit and quasi-legal. The EVA could bar subsidies to schools which charged tuition for voucher students, or schools which discriminated in their admission policy, or schools which refused to disclose specified kinds of information to the public. But it could not withold subsidies simply for doing a poor job, or for offering a curriculum which offended the taste of the EVA's board, or for any other idiosyncratic reason. It could, of course, invent seemingly "neutral" criteria whose actual purpose was to justify exclusion of a particular school. But the very necessity of doing this would normally lead to a far more just policy than would a system in which the public authorities could give or withold public monies without offering any explicit justification for the decision.

The difference between the systems is best understood by looking at a hypothetical example. Let us suppose that several young teachers decide that they would like to operate a school along the lines pioneered in Leicestershire, England. In the regulated voucher system proposed in Section I these teachers must meet state requirements for private schools, must demonstrate that their school is open to everyone on a non-discriminatory basis, and must make a full description of their school available to the public. Then, if parents enroll their children, the school can cash their vouchers. If the EVA wants to withold the money, the burden of proof is on the EVA to show that the school is ineligible to cash vouchers because it violates some previously promulgated regulation.

Now let us suppose that this same group of teachers wants to run the same kind of school in a voucher system confined to the public sector. Under the first version of such a system, the group would go to the superintendent and seek permission to take over an existing public school. The teachers would all be directly employed by the public schools, and their school would differ from existing public schools only insofar as the central administration gave it permission to differ. Under the second version of such a system, the teachers would form a corporation and would contract with the board of education to manage a public school.

Unfortunately, boards of education and superintendents have not usually been very responsive to such proposals for innovative schools. There is nothing in existing law in most states to preclude the establishment of alternative public schools, either within the public system or on contract, and yet only a handful of boards of education have moved in this direction. So long as the burden of proof for demonstrating the value of a proposal is on someone else, boards of education and school administrators are likely to be extremely cautious. The political cost of having said "no" to a good proposal is seldom as great as the cost of having said "yes" to a proposal that then turns out badly.

Furthermore, so long as the criteria for accepting or rejecting a proposal need not be made precise and explicit, most potential innovators will simply assume that their proposals stand no chance of acceptance, and will not bother to develop them into workable form. The board will therefore receive few proposals, and will feel sure that no new ideas or competent leaders exist outside the public system.

Many of these difficulties could be avoided if the local board of education made an official commitment to fund *any* alternative school which met certain explicit criteria. The board might, for example, agree to designate as "public" any school that met minimal state requirements, agreed to open its doors on an equitable basis to everyone, and agreed to disclose fully what it was doing. The board could promise such schools space and fund them on the basis of a per capita formula derived from what it was spending in other schools. In this way the board could in effect become an EVA. With luck, this might convince educational innovators that they had an excellent chance of getting financial support if they followed the official ground rules laid down by the public system for receiving public money, and might lead to a greatly diversified public system.

This approach would presumably rule out the participation of certain kinds of schools. In particular, church-related schools would probably not want to participate, since once they had been designated as legally "public", they would be subject to the Constitutional prohibition against prayers in the same way as existing public schools. Profit-making schools might also be ruled out, although the public system could perhaps allow profit-making groups to *manage* a public school.

The full range of existing procedural and substantive restrictions on public schools would presumably apply to all schools in a voucher system restricted to "public" schools. This might discourage or prevent many innovative educators from participating, and it might seriously restrict the range of alternatives that would become available. Suitable enabling legislation might, however, eliminate this problem.

We conclude that a voucher system confined to the public sector could result in a substantial increase in parental choice _if_ the school administration and board of education were willing to take risks. But we expect this would be the exception rather than the rule. A voucher experiment confined to the public sector would almost certainly be some improvement over the status quo, but it would probably mean far more cautious and limited innovation than the system described in Section I.

B. Vouchers Confined to Private Schools

Many people think of an educational voucher system as a proposal for financing private education through "scholarships". The regulated voucher system proposed in Section I goes much further than this, in that (1) it also proposes mechanisms for introducing diversity and choice within the public sector, and (2) it proposes rather stringent conditions for private schools' cashing vouchers. As indicated in Chapter 1, a system of this kind would change the traditional meaning of the terms "public" and "private." On the one hand, even publicly managed schools would presumably have more budgetary and administrative autonomy _vis à vis_ the school board and the central school administration than at present, and in this respect would be more like private schools. On the other hand, both publicly and privately managed schools would have to commit themselves to genuinely open, non-discriminatory admissions policies, letting in all students without regard to race, and letting in at least half without regard to test scores or neighborhood residence. Many public school administrators have said that they could not or would not try to make neighborhood schools "public" in this sense. This reluctance reflects the fact that parents in many white neighborhoods regard the nearby public school as "theirs," and resist any proposal which would open their school to "outsiders," especially black outsiders. This resistance is likely to be particularly fierce when a large number of "outsiders" is expected to apply. Accepting them would mean severe crowding, double sessions, temporary classrooms, and the like. Restricting enrollment would mean resorting to a lottery or some similar device for choosing among applicants, and would in some cases exclude some neighborhood children from their "own" school. Foreseeing this, some politically sensitive school administrators and mayors have concluded that a voucher system ought to leave the neighborhood public school untouched, and should make vouchers available only to children who want to go elsewhere.

The limitations of this approach are obvious, but not necessarily overwhelming. First, such a system offers little help to public school principals and teachers who would like to try one or another innovative program, but cannot do so because it would be unpopular with some part of their neighborhood clientele. Under a voucher system confined to the private sector, the neighborhood public schools would provide the non-innovative alternative, while the private sector would provide new options to families that wanted them. This is, of course, a traditional division of labor between the public and private sectors in America, but it is probably not one which ought to be encouraged. Since the majority of children will probably remain in public schools no matter what system is adopted, forcing the public schools to remain in a traditional mold and leaving innovation to a few private schools seems unfortunate.

A second major objection to excluding neighborhood schools from voucher system financing and voucher system regulation is that such a policy severely restricts the choices available to black families. Many such families are anxious to enroll their children in racially integrated schools. There is little chance of integrating existing public schools in black neighborhoods. For most black parents the only plausible way to achieve integration is to enroll their child in a school in an integrated or white neighborhood. Most of these schools are now public neighborhood schools. If they continue to admit only neighborhood children, black parents living in all-black neighborhoods will be left with no integrated alternatives.

Despite these limitations, a voucher system which is confined to the private sector has obvious political advantages. While it threatens the existing public school system ideologically, in that it challenges the legitimacy of confining public subsidies to publicly managed schools, it does not threaten the public system politically, since it does not require important rearrangements of financial and staffing arrangements or of attendance patterns. A "private only" voucher system would enable dissatisfied community groups to establish their own schools, and it would also enable principals, teachers, universities, and others with educational ideas to set up their own schools. If church-related schools were allowed to cash vouchers, a "private only" voucher system would also keep the parochial school system going, and would forestall the influx of Catholic children into the already overburdened public system. If profit-making schools were allowed to cash vouchers, a "private only" system would also allow private enterprise to try its hand at education. Even if profit-making schools were barred, non-profit private schools could presumably contract with profit-making firms to provide specific services, operate part of the curriculum, or whatever.

A voucher system confined to the private sector is, then, far less likely than a comprehensive voucher system to result in major changes in the range and quality of choices available to most children. But perhaps for that very reason it may be more politically palatable. Properly regulated, it would certainly represent a modest step in the right direction.

C. Vouchers Confined to the Poor

A number of people have suggested that OEO should conduct an experiment in which the use of vouchers is restricted to the poor. The primary reasons for this suggestion are (1) a feeling that the poor are the ones whose children need special help, especially from OEO, and (2) the hope that if only poor parents received vouchers, the white middle-class could not use the system to maintain segregation. Many of the difficulties with this approach were touched on in Chapter 2 of Section I, especially in the discussion of the

"Unregulated Compensatory Model". This part of this chapter deals in more detail with some of the problems with a "poor only" system.

The fundamental problem raised by making vouchers available only to poor children is that all children must have access to free schools. If middle and upper income families are denied vouchers, then their children must be able to attend the same neighborhood public school they have always attended. Since most families are not officially defined as poor, most neighborhood public schools, particularly those in middle income neighborhoods, would continue to operate much as they always have. They would presumably not have budgetary autonomy. Thus they would not have any real incentive to find room for applicants from outside the neighborhood. (Even if these applicants had valuable vouchers, the money would go to the central school administration, not the local school.) If public schools in middle-class neighborhoods have no incentive or obligation to make room for disadvantaged children, and if middle-class children have no opportunity for free education except in these schools, the disadvantaged child will have almost no opportunity to use his voucher in an economically integrated school.

Indeed, a voucher system designed exclusively for the poor would involve only a small fraction of the children in any public school, even in a relatively poor neighborhood. All existing public schools, including those in the poorest neighborhoods, would therefore have to continue their present operations on much the same financial and administrative basis as at present. This would make it almost impossible to generate new educational alternatives in existing public school buildings or with existing staffs, since these schools and staffs would for the most part be committed to their traditional clientele and could not hold out any alternative to parents who disliked any given innovation.

The public sector could theoretically establish new experimental schools, especially designed for voucher holders, but it would hardly find this politically attractive if vouchers were confined to the poor. For one thing, the new schools would be economically segregated. For another, they would exclude the vast majority of children whose parents are actively dissatisfied with their children's education.

New private schools might be created to cater to voucher holders, but these schools would also labor under great difficulties. No genuine "community schools" would be possible, because no urban community is composed primarily of people who fit any official definition of poverty. Most potential leaders of community school movements would discover that their children and many of their friend's children were not going to qualify for help, and would lose interest in creating a new school. New private schools catering to voucher holders would thus tend to be schools run *by* the middle classes *for* the disadvantaged. They would also be economically segregated.

A voucher system designed exclusively for poor children would probably create few new educational alternatives. It would, however, give some poor children access to *existing* private schools, whose tuition is now beyond the means of poor families. Some of these private schools would, of course, be reluctant to expand their low-income enrollment appreciably, even if the cost of the children's education were largely or entirely covered by vouchers. But some private schools, especially some Catholic schools in poor neighborhoods, would jump at such an opportunity. Such schools now enroll a number of poor children, including many non-Catholics. Many charge these children little or nothing. Vouchers for poor children would enable them to expand their low-income enrollment. Vouchers would also increase these schools' overall income, enabling them to cut class size and make other improvements.

We conclude, then, that a voucher system confined to poor children would enable a moderate number of disadvantaged children in urban areas to attend Catholic schools that are currently underutilized and might otherwise go out of business. Some low-income parents, both Catholic and non-Catholic, would regard this new option as an improvement. The cost to the federal government would also be modest. But a formula for revamping uurban education it is not.

D. Vouchers Confined to Non-Profit Schools

One of the most common objections to a voucher system is that it would encourage profit-hungry "hucksters" to open schools which spend most of their income attracting customers and paying back investors rather than educating children. One device for solving this problem is to bar profit-making organizations from cashing vouchers. The California legislature inserted such a provision when it considered enabling legislation for a voucher demonstration during 1970, and similar restrictions have been attached to some other legislation aiding private schools (see Appendix E).

This part of this chapter considers three questions:

(a) Would profit-making schools be likely to attract large numbers of students under a voucher system?

(b) Would profit-making schools be likely to provide substantially worse education than non-profit schools?

(c) What would be the practical effect of barring profit-making schools from a voucher system?

(a) Probable Prevalence of Profit-Making Schools

Much of the discussion of "hucksters" in a voucher system seems to be predicated on the notion that vouchers would create an entirely unprecedented opportunity for profit-making groups to open schools. This is hardly so. There are already some six million American children enrolled in non-public schools. Very few of these children are in profit-making schools. In part this is because most of the parents who enroll their children in private schools cannot afford to pay as muuch tuition as a profit-making school would have to charge.[1]

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[1] The overwhelming majority of private schools are affiliated with a religious denomination. Most of these church-related schools spend less per pupil than nearby public schools. In good part this is because they are at least partly staffed by religious teachers who work for subsistence. In addition, some church-related schools receive direct subsidies from the churches with which they are affiliated. Most church-related schools have thus been able to keep tuition relatively low, in a way that proprietary schools cannot. All this is changing, but it makes past parental preference for church-related schools irrelevant when considering the likely future demand for places in profit-making schools.

But even those parents who have enough money and choose to buy private education at full cost seldom choose profit-making schools. While no exact statistics are available, several hundred thousand children are enrolled in unsubsidized private elementary schools. Only a handful of these schools are operated for profit.

We have no simple explanation for the prevalence of non-profit rather than profit-making elementary schools. Several factors seem to play a role. When elementary schools operate for a profit, the owner is almost always the principal, rather than some outside individual or corporation. In many cases it is not even obvious to outsiders that the school is operated for profit. Parents often just think of the school as being synonymous with the individual who runs it, and ask no questions about its finances. This suggests that while parents are probably not very sophisticated about school finance, they may be suspicious of schools where profit is an overt objective.

The scarcity of profit-making schools is, however, probably attributable to other factors as well. Parents tend to seek schools which have a good reputation, and reputations depend heavily on what educators say about a place. Educators in non-profit schools have a strong prejudice against profit-making schools. In some cases this prejudice is so strong that accreditting associations refuse to consider profit-making schools as even potentially reputable, although this is more common at the college level.[2]

It is true that when students begin to make their own decisions about their education, they are more likely to enroll in profit-making institutions. Driver training schools, foreign language schools, computer programming schools, secretarial schools, beauty schools, and a host of others testify to people's willingness to attend institutions which operate for a profit when they want specific skills rather than more general education. But this is not very relevant to elementary schooling, which is primarily concerned with socialization and general training of a kind that most parents do not seem to think a profit-making school likely to provide.

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[2] The Middle States Association of Colleges and Secondary Schools, for example, will consider proprietary secondary schools for membership but not proprietary colleges. It accredits three such schools. The Western Association of Schools and Colleges also accredits proprietary schools.

These judgments are reenforced by looking at higher education. There are a handful of proprietary colleges, and a much larger number of proprietary technical training institutions. When the G.I. Bill gave large numbers of young men a chance to attend the institution of their choice, a small number enrolled in "fly-by-night" institutions which took their money and taught them little or nothing. Most of these institutions purported to teach some marketable skill. Very few purported to offer liberal education or even professional-level training. They managed to defraud their students largely because there was no professional group or regulatory agency designated to police their activities. Whenever serious regulatory efforts were instituted, the problem diminished to a negligible level. Furthermore, even when regulation was non-existent, fraudulent institutions got only a tiny fraction of the market. The great majority of GI's, even those who were in no way sophisticated about differences between "good" and "bad" colleges, applied to reputable institutions. While there seem to have been plenty of GI's who learned little of value from their post-military education, most of them were enrolled in fully accreditted colleges, often under public control. This would probably be true in a voucher system too.

Some critics of vouchers argue that while middle-class parents and students may have enough sense to avoid schools run by profiteers, disadvantaged parents are not equally shrewd. The poor are now the most frequent victims of business fraud, and a voucher system is often expected to make this equally true in education. If the present non-profit system were serving the poor at all adequately, this argument would be very telling. Given the actual distribution of benefits from non-profit schools, the case is less clear. Our field work suggests that the initial educational preferences of disadvantaged parents in a voucher system would probably be quite traditional. The idea that schools should teach manners and morals is as strong among the disadvantaged as among the advantaged, and distrust of business is even more widespread among the poor than among the affluent. This makes it hard to imagine large numbers of poor parents turning their children over to schools which they perceive as primarily profit-oriented.

Large corporations that wanted to break into an educational market might try to deal with such suspicions by linking up with some respected local non-profit group which wanted to start a voucher school. The corporation might then contract with the local group to manage part or all of the school program. Most non-profit schools already make such arrangements for certain services. Both public and private schools normally contract with profit-making firms to do their construction work, for example, and many do the same to obtain school lunches, to have their buildings maintained, and so forth. Even on the instructional side, most schools contract with profit-making firms to obtain instructional materials such as textbooks and audio-visual equipment. In the past two years, a number of public schools have also entered into contracts with profit-making firms to train teachers, set up new classroom arrangements, and so forth. Such contracts would presumably be permissible even in a system which barred profit-making schools from cashing vouchers.

Of course, profit-making schools need not be operated by national corporations. Small local groups, including bona fide educators, may also start proprietary schools. We suspect, however, that the disclosure requirements proposed in Section I would have a very adverse effect on enrollment in any proprietary school that made large profits. If an individual wanted only modest profits, and if he planned to manage the school himself, he would probably find it easier to attract students if he made himself principal and paid himself a good salary than if he tried to operate as a profit-making enterprise.

The foregoing considerations suggest that even if a voucher system allows profit-making schools to participate, the number of parents using such schools is likely to be small. This prediction could be wrong, however. Furthermore, even if it is right, it does not answer the question of whether profit-making schools should be allowed to participate. The answer to that question does not depend on whether profit-making schools are likely to get one percent of the market or fifty percent, but on whether children who attend such schools are substantially more likely to be miseducated than children in non-profit schools.

(b) Quality of Profit-Making Schools

It is more or less an article of faith among non-profit enterprises in any particular field that they offer services superior to those provided by profit-making enterprises in the same field. This assumption may well be correct, but it is hard to find much evidence to support it, either in education or elsewhere. Persuasive evidence about the quality of services offered by different enterprises is simply not available in most fields, including education. Generalizations about the quality of profit-making schools must therefore be deduced from theoretical arguments rather than being built up on the basis of empirical evidence. This is a risky business.

Critics who argue for exclusion of profit-making schools offer two justifications for this position. First, they assert that all schools are plagued by inadequate resources, and any arrangement which allocates some of these resources to profit inevitably leaves less for education. Second, the critics argue that the profit motive will affect the way in which a school is operated, to the detriment of the students.

The first argument is unpersuasive. If schools were shoe factories, in which a well-understood technology was being applied in a relatively consistent fashion, it might be reasonable to assume that any reduction in the resources available for the enterprise would reduce output. But schools are not shoe factories, and the factors affecting their output are virtually unknown. The available evidence indicates that expenditures have very little impact on such outputs as standardized test scores, college entrance rates, and student attitudes. This suggests that the amount of money a school spends is less important than the way the money is spent. A profit-making school which diverts ten or even twenty percent of its income to profit, but which uses the other eighty or ninety percent wisely, will produce better results than a school which spends all its money in the school but uses it less imaginatively.

The question, then, is whether non-profit schools are more likely than profit-making schools to use their money imaginatively. We have no clear basis for answering this question. Supporters of profit-making schools claim that the profit motive generates efficiency, but this argument seems unpersuasive, since competition between non-profit schools should serve the same purpose. Supporters also argue that the possibility of making a profit will attract individuals to education who are more willing to take risks than the average educator. This may be true, but it is not necessarily desirable. There is no evidence that the kinds of risks businessmen are willing to take have any relationship to the education of children.

The critics of profit-making schools argue that attempts to maximize profits lead to a variety of corner-cutting arrangements within a school. Unfortunately, attempts to balance non-profit budgets have precisely the same result. It may be that money is less of a consideration on a day-to-day basis in non-profit schools. But this may simply be another way of saying that people who run profit-making schools are likely to have different preoccupations from people who run non-profit schools. Profit-making schools may be more willing to alter established procedures in order to cut costs, and less concerned with the effect of such alterations on the internal tranquility of the school. Whether this would be an argument for or against proprietary schools is unclear.

The most visible difference between profit and non-profit schools is likely to be the staffing pattern. All schools allocate the bulk of their budget to staff, and there is little room for economy in any other area. If a school is to make a profit while operating at the same budgetary level as a non-profit school, it must either pay its staff less or hire fewer of them.

Neither of these economies would automatically reduce the quality of children's education. There has been considerable research on the relationship between teacher salaries and school effectiveness. It shows the relationship to be extremely erratic. Likewise, two generations of research have shown that while teachers, students, and parents almost all prefer small classes to large ones, students who are educated in small classes emerge almost indistinguishable from those educated in large ones.[3] Thus it is hard to see any compelling evidence that profit-making schools would turn out worse educated children if they economized on staff costs while innovating in other ways.

Overall, we doubt that profit-making schools would be more effective than non-profit schools. But the evidence that profit-making schools would necessarily be less effective is also unpersuasive.

(c) Practical Problems

Let us suppose that a state or the local EVA decides that only non-profit schools can cash vouchers. What are the results likely to be?

First let us consider a situation where there is a very large unmet demand for certain kinds of education. Under these circumstances there might be a good deal of potential profit in setting up a suitable voucher school. If profit were forbidden, firms which thought they could meet the demand would probably try to establish non-profit subsidiaries to operate schools. They would then have these subsidiaries contract with the profit-making parent organization to manage the school, supply textbooks and equipment, train the teachers, or whatever. If the EVA barred such arrangements, the entrepreneur would presumably seek a local "front" which would establish the school on a nominally independent basis, but which would contract with the entrepreneur to provide specified services. The EVA could, of course, forbid all schools to contract with profit-making firms to provide instructional services. A restriction of this kind would, however, seem to defeat the primary objective of the voucher system, namely the encouragement of flexibility and diversity in education.

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[3] See, e.g., James Coleman *et. al.*, *Equality of Educational Opportunity*, U.S. Government Printing Office, 1966. While the "Coleman Report" has been widely criticized on methodological grounds, the Report's conclusions on these issues have been supported by much other research and by reanalyses of the EEO data. See, e.g., the articles to be published in Daniel Patrick Moynihan and Frederick Mosteller, *On Equality of Educational Opportunity*, Random House (forthcoming).

In addition to educational skills, profit-making firms might be able to provide risk capital. If the EVA put up seed money for new schools and provided adequate loans to rehabilitate facilities, there would be no need for private capital. But if public funds were not readily available for getting new schools started, and if the demand for new schools were substantial, private capital would be essential. In some cases, such capital might simply be borrowed and then repaid from voucher income. But starting a new school is a risky business. Unless there were a chance of making a substantial profit, few private investors would loan large sums to a school which still had no customers. Investors might be persuaded to put up money for initial staffing and rehabilitating facilities if they were guaranteed a share of the school's profits. If profit-making schools were prohibited, all kinds of loan and mortgage agreements could be devised to achieve the same result. A non-profit school might, for example, borrow a large sum from a private investor at a very high interest rate, with repayment contingent on the schools' getting a certain number of students. The main difference between such a loan and the sale of stock would be that the investor would have no formal control over the day-to-day management of the school. But even this might not be true, since the investor might insist on representation on the school's board in return for the initial loan.

The foregoing discussion assumes that a voucher system restricted to non-profit schools would leave many demands for new kinds of schooling unmet, and that profit-makers would therefore be eager to enter the field. This need not be true. If technical assistance and risk capital are fairly readily available to individuals and groups wanting to start non-profit schools, such schools will proliferate to meet almost any widely felt need. If non-profit schools are competitive, flexible, and relatively efficient, the potential profit margin for entrepreneurs will inevitably be low. Under these circumstances it would be relatively simple to enforce regulations which excluded profit-making enterprises from the system. When potential profits are high, ingenious businessmen and attorneys will devote endless hours to getting around official restrictions. But when potential profits are low, they no longer think it worth the bother to circumvent official regulations,and turn to other fields.

The best way to prevent profit-making schools from entering a voucher system may, then, be to make rules which facilitate the creation of non-profit schools. Specifically, the EVA must find ways to provide the risk capital needed to get new non-profit schools off the ground. Otherwise, such capital will have to come from those seeking a profit.

(d) Conclusion

We can see no prima facie case for excluding profit-making schools from a voucher system. The arguments against their participation are all unproven and for the most part illogical. Yet the case for allowing profit-making schools to participate is also far from conclusive. There is no evidence that profit-making schools are more effective than non-profit schools, and some reason to suspect that they might be less so. In the absence of conclusive evidence on either side, it seems wisest to err on the side of permissiveness and let profit-making schools participate. This leaves the decision about whether to trust such schools up to the parents, instead of having the state make up parents' minds for them. Tight regulation of a voucher system seems both necessary and appropriate in those areas (e.g., admissions policy, tuition charges, information disclosure) where past experience has demonstrated that an unregulated system is inadequate or inequitable. But where past experience is inconclusive, as in the case of profit-making schools, it seems more reasonable to avoid regulation and create a system which generates a wide variety of options.

7. Identifying Children with Special Educational Needs

Chapter 2 proposed that vouchers for children with special educational needs have greater redemption value than vouchers for children with no special problems. Chapter 2 did not, however, go into much detail about how children's "needs" might be identified or how the cost of meeting those needs might be estimated. Experience suggests that there is no one "best" solution to this problem, and it therefore seems desirable to allow each community considerable leeway in developing answers which make sense to the residents of that community. If, as seems likely, the costs of meeting special educational needs in a demonstration are in large part born by state or federal agencies, formulae for identifying and assisting such children will have to be worked out in negotiations between the local community and the funding agency. In Chapter 5, for example, we propose a demonstration project in which a basic voucher would be largely supported from state and local funds, while a "compensatory" increment for disadvantaged children would be paid for by OEO. The criteria for identifying disadvantaged children and the magnitude of the compensatory increments would obviously have to be worked out between the applicant community and OEO. Nonetheless, the Center's work with interested communities makes it clear that many of these communities want suggestions about how such a formula *might* work. The present chapter therefore lists a number of alternatives and offers some judgments about their merits and demerits.

To begin with, we will assume that mechanisms already exist for identifying children whose problems are drastically different from those of "normal" children and who require (or are at least alleged to require) separate educational programs. The most obvious cases are deaf, mute, and blind children. Children with cerebral palsy and children who are crippled or suffer from other physical defects are also easy to identify. Nor is there any problem in augmenting the value of their vouchers so that it equals whatever is now being spent to educate these children in the public system. In many communities there are also special programs for the "mentally retarded" and the "emotionally disturbed". While it is by no means simple to determine when a child ought to be classified as "mentally retarded" or "emotionally disturbed", most communities now have procedures for doing this, and many allocate special resources to the education of children so classified. There would be no problem continuing these arrangements under a voucher system, using the same classification system and then augmenting the value of the child's voucher by the appropriate amount. We would argue, too, for identifying children whose parents did not speak English and augmenting their vouchers so as to ensure their schools sufficient funds to provide them with special language help.

The foregoing problems are all relatively simple. The difficult problem is classifying children who are not acutely retarded or disturbed. Such children constitute the overwhelming majority of the school population. They are not all exactly alike, however; some require more help in school than others. Many of those who require special help have in recent years been labeled "disadvantaged", and have been the target of "compensatory" programs funded by the federal government under Title I of the Elementary and Secondary Education Act.

Title I established the precedent of providing special help for the "disadvantaged", but it sidestepped the problem of deciding precisely who was disadvantaged and who was not. It did this by assuming that schools in poor neighborhoods have most of the educational problems. It then allocated money to schools on the basis of neighborhood characteristics. This device is not appropriate in a voucher system, because one of the primary objectives of the system is to enable children to attend schools outside their own neighborhood if they wish to do so. If schools which now have relatively few disadvantaged children are to be persuaded to let in more, they must be guaranteed additional resources to help deal with the ensuing problems. This means that compensatory funds must follow a disadvantaged child even if he leaves his neighborhood - or if he lives in a prosperous neighborhood to begin with.

There are a variety of possible formulae for identifying disadvantaged children and augmenting the value of their vouchers. One EVA might equate educational "need" with family income. Another might equate it with the child's score on a Metropolitan Readiness Test administered when the child entered first grade. Still another might equate it with the median income of the neighborhood in which the child lived. None of these formulae would be entirely satisfactory. A child's educational needs depend on many different factors, too numerous and too subtle for incorporation in any single administrative formula. Nonetheless, while no formula is ideal, almost any formula is better than simply assuming every child has the same needs and setting all vouchers at the same level.

In order to evaluate alternative formulae, we must first say something about how any formula might actually work. Let us imagine a simple formula based on family income. Suppose that the voucher of any child whose family earns less than $2,000 per year is worth $1500, that the voucher declines to $1400 for children whose families earn between $2,000 and $3,000, and that the voucher keeps declining by $100 for each $1000 increase in family income, up to $8,000 per year. All families over $8,000 per year receive vouchers worth $800 per child.

The voucher system proposed in Section I does not require any school to spend the same amount on a child that it receives from the EVA for that child's voucher. If a middle-income child with a $800 voucher were enrolled in a low-income school where the average voucher was $1100, the school could spend $1100 on the middle-income child as well as on the lower income children. If a school used extra money to hire better teachers, cut class size, buy more books, or otherwise improve its overall program, it would hardly want to make access to these resources dependent on parental income. Even if the school set up special programs for slow learners, such as remedial reading classes, it would be unlikely to restrict these classes to children who were "disadvantaged" by official criteria. Any sensible school would fill its remedial reading classes with slow readers, including those from affluent homes, while excluding fast readers, even if they came from poor homes.

Conversely, if a low-income child with a $1500 voucher enrolled in a middle income school where the average voucher was worth $900, the low-income child would not get much direct benefit from the fact that his own voucher was worth $1500. The school would probably not spend much more than $900 on a low-income child even if his voucher was worth $1500. The difference would be spread across the whole school. If the child had special educational problems, of course, he might get special help. But this would be equally possible if his voucher were worth only $800.

It follows that if a family wanted to increase the amount of money spent on its children, its first step should be to enroll these children in a school with a lot of disadvantaged classmates, since such a school would have high per pupil resources. In addition, a family that wanted to get additional resources for its children should try to persuade the child's school that the child needed special attention for one reason or another. A family's success in either of these efforts would not be likely to depend appreciably on whether the child was disadvantaged by some official criterion and hence had an unusually valuable voucher.

Nor would the value of a child's voucher have any direct economic impact on a family under the system proposed in Section I. Under the preferred model, no school would be allowed to charge private tuition for any child whose voucher it cashed. Any parent holding a voucher would thus be guaranteed free education, regardless of the redemption value of the voucher.

Under these circumstances, a formula for identifying special educational needs has two kinds of impact. First, it determines how money is allocated between schools, though not how it is allocated between individuals in the same school. Second, it influences students' chances of getting into the school of their parents' choice. A good formula must therefore try to achieve equity among schools by allocating funds in proportion to the average need of the children in a given school. It must also try to achieve equity among individuals, by eliminating the average school's tendency to discriminate against any particular kind of applicant. To achieve equity among individuals, the formula must try to make the value of every child's voucher equal to the marginal cost of admitting that child to the average school, with "cost" being defined in both economic and psychological terms.

We will take up equity among schools and equity among individuals in turn.

A. Equity Among Schools

Many different formulae for augmenting the value of vouchers are likely to be acceptable and roughly comparable for achieving equity among schools. The reason for this is that while different formulae will set individual children's vouchers at different levels, these same formulae will result in very similar total payments to schools. The choice of a formula will therefore have little effect on particular's schools' per pupil expenditures.

Suppose, for example, that we define a child as "educationally disadvantaged" if he scores below the national average on a standard non-verbal test when entering first grade. But suppose that for political reasons an EVA could not actually use standardized tests to set the value of children's vouchers, and instead relied on family income as its criterion. Family income is not highly correlated with individual children's test scores. Thus the EVA's policy of classifying all low-income children as "educationally disadvantaged" and all high-income children as "educationally advantaged" would result in a lot of children's being misclassified. Table II A shows that such mistakes would result in the misclassification of approximately one child out of every three.

Now suppose that instead of classifying individuals, the EVA is only interested in classifying schools. Suppose it believes that all schools whose students average score falls below national norms are disadvantaged, and that all schools whose average score exceeds

A. Approximate Percentages of Children Who Are "Advantaged" and "Disadvantaged" Using Two Different Criteria

		Family Income		
		Above Average	Below Average	Total
Non-Verbal Test Scores	Above Average	33	17	50
	Below Average	17	33	50
	Total	50	50	100

B. Approximate Percentages of Schools That Are "Advantaged" and "Disadvantaged" Using Two Different Criteria

		Family Income		
		Above Average	Below Average	Total
Non-Verbal Test Scores	Above Average	43	7	50
	Below Average	7	43	50
	Total	50	50	100

Source: Data collected in 1965 by the Equality of Educational Opportunity Survey and reanalyzed at the Center's request by the Center for Educational Policy Research at Harvard University. Estimates are approximate due to probable measurement errors in the survey.

the national norm are advantaged. Again suppose that for political reasons the EVA cannot obtain these scores, and that it falls back on median family income to determine which schools are advantaged and disadvantaged. Schools' mean scores are highly correlated with the median incomes of the families they serve. Table II B shows that an EVA which relied on median income instead of test scores would classify schools correctly in about six cases out of seven.

The foregoing examples suggest that insofar as we are concerned with equity among schools, the criterion used for determining who is "disadvantaged" probably makes relatively little difference. If, for example, an EVA preferred not to ask parents about their incomes, and preferred instead to make compensatory payments a function of the number of AFDC children enrolled in a school, this would also produce much the same overall distribution of resources - unless, of course, schools found a way to discriminate in favor of AFDC children but against other disadvantaged applicants. Similarly, if an EVA thought it embarassing to ask for income data and simply computed compensatory payments on the basis of the neighborhoods from which children came, the distribution of compensatory funds among schools would probably not be greatly altered. Likewise, if the EVA decided to make compensatory funding a function of the mean test score of children entering a school, it would usually find that varying the test had relatively little effect on the amount of money going to different schools.

B. Equity Among Individuals

In a system where no school charges tuition, the criteria used for determining eligibility for compensatory payments might seem to be a matter of relative indifference to individual families, arousing concern only among the schools which would actually receive the money. But this is not quite so. The redemption value of a voucher would not affect either the cost to his family of a child's education or the resources devoted to the child by his school. But it might affect the parents' chances of getting their child into the school of their choice.

The voucher system proposed in Section I would require overapplied schools to accept half their children by a lottery among applicants. But in filling the other places, a school could normally be expected to favor children with augmented vouchers over those with regular vouchers, all other things being equal. The theory behind compensatory payments is, of course, that all other things would not be equal. Children with unusually valuable vouchers would usually be children with special educational problems. Not only that, but each child's voucher should in theory be augmented by just enough to cover the economic and psychological cost of dealing with his specific problems. If the system worked perfectly, schools should be indifferent as to which students they got, since the marginal fiscal and psychological "cost" of enrolling any given child would match the value of his voucher.

But this world will never exist. Formulae for distributing compensatory payments will always augment the vouchers of some children who have relatively few problems, and will fail to augment the vouchers of others who have a lot of problems. If, for example, compensatory payments are based on family income, schools will tend to favor children with low incomes and high IQ's, while discriminating against children with high incomes and low IQ's. If compensatory payments are inversely related to IQ, schools may discriminate against pupils with high IQ's and emotional problems, while favoring children of moderate IQ who appear happy, docile, and easy to teach. This does not mean that compensatory payments are useless. They will almost inevitably reduce discrimination, even though they can never completely eliminate it. The point is only that a bad formula does less to reduce discrimination than a good formula.

There are three possible approaches to this problem, none of which is perfect. The first approach is to withhold information about the value of individual children's vouchers from the schools they attend. This may discourage schools from discriminating against certain categories of children, though it certainly cannot completely eliminate such discrimination. The second approach, which is perfectly consistent with the first, is to base compensatory payments on a relatively sophisticated formula which offsets many of the schools' natural preferences by offering them economic incentives not to discriminate. The third approach is to require schools to accept all applicants or else select them all by lot. This would eliminate all possibility of invidious discrimination, but it has the disadvantage of also eliminating certain kinds of "non-invidious" discrimination that are actually desirable on other grounds. This third alternative was discussed (and tentatively rejected) in Chapter 3. The present discussion focusses on the other two.

a. Withholding Information From Schools

Suppose the EVA decides to make compensatory payments to schools on the basis of parental income. In order to do this the EVA might ask parents to report their taxable income for the previous year when they registered a child for school and were issued a voucher. The EVA would then have two options. The first option would be to apply its formula for computing compensatory payments, determine the precise value of each child's voucher, and write this amount on the voucher so that both the parents and the school would know its redemption value. The second option would be for the EVA to hold the income information confidential and issue the parent a voucher of unspecified value. Schools could also be forbidden to inquire about applicants' incomes (although parents could hardly be forbidden to report incomes, and many clues would be available). Schools would admit pupils, collect their vouchers, and return them to the EVA. The EVA would use its confidential income information to determine the total value of each school's vouchers and would send the school a check for the total. The school would never know precisely which pupils were bringing in compensatory payments and which ones were bringing only normal vouchers.

One obvious objection to keeping the value of the voucher confidential is that it may be an impossible rule to enforce.

Parents may, for example, volunteer income information. Secrecy could, moreover, complicate schools' budgeting procedures, since they would not know exactly how much income to anticipate from each student. This difficulty could, however, be eliminated by having the EVA provide the school with an advance estimate of the value of its vouchers. This could be done as soon as the admissions process for a given year had been completed, e.g., in April for the year beginning in the following September. This would give schools more lead time in developing their budgets than the present budgetary process gives most public school systems. It would certainly give schools considerably more advance assurance about probable income than businesses usually have. Schools might not, however, trust the EVA to provide them with their fair share if they could not verify the figures independently.

One obvious advantage of withholding information about the redemption value of a child's voucher is that such a procedure would probably make the collection of income information more politically acceptable. If income information were available only to the EVA and not to a child's school, some parents who would otherwise object might perhaps be mollified.

Another important question, however, is whether withholding information about the precise value of a child's voucher would make schools' admissions policies more or less discriminatory. This would depend on whether, in the absence of actual information, the average school overestimated or underestimated the probable redemption value of vouchers held by what appeared to be "problem" children. Our guess is that because of the widespread belief that most "problem" children come from poor families, schools would tend to overestimate the value of "problem" children's vouchers. In the absence of information to the contrary, we would expect schools to assume that an apparently dull or disturbed child was entitled to a high voucher and to assume that a clever, well-scrubbed child had only a normal voucher. If schools did make such assumptions, they would be less likely to discriminate against low IQ and emotionally disturbed children, because they would expect them to be worth more money on the average than they really were.

Withholding information about the value of a child's voucher could, however, have the opposite effect, if the absence of information resulted in schools' simply ignoring variations in the value of vouchers when making admissions decisions. Instead of just trying to exclude the low IQ applicant with a low voucher, for example, schools might tend to exclude all low IQ applicants.

b. Tailoring Compensatory Funds to Need

Given the uncertain benefits of withholding information on the value of individual children's vouchers, discrimination might be most effectively discouraged by making the voucher's value conform as closely as possible to the anticipated difficulty of educating a particular applicant. This means that compensatory payments should not be a function of parental income, but rather of the child's own characteristics. Ideally, compensatory payments should reflect the two factors which are likely to loom largest in the minds of schools, namely the child's performance on standard tests (e.g., Metropolitan Readiness), and the child's apparent ability to fit into the school routine without "causing trouble". But this is not easy to do. We cannot imagine any psychologically reliable or politically acceptable device for classifying children's behavior patterns and assigning compensatory payments to those whom the average school would regard as "undesirable". There are also both political and logistical problems in getting test scores before a child enters school. Tests could be given when a parent took the child to the EVA to register him and get his voucher, but this would be expensive. If testing were postponed until the child entered school, some schools might cheat, artificially lowering the performance of the average child (e.g. by misreading the directions for the test) in order to increase the average compensatory payment. Such dissembling would have the additional advantage of making the school look very good when the students did much better at the end of first grade. Even the use of EVA testers would not entirely eliminate such possibilities if testing were delayed until after the children had entered school. Under any system, a child's entering score should remain the basis for computing his compensatory payment throughout his career in a given school. Otherwise, a school would lose money when its children improved and would gain when they fell behind.

All in all, we think a formula based on test scores makes more sense than any other. But we are not convinced that an EVA could sell such a formula to minority group parents, even though it would work more to their advantage than any other.[1] We therefore turn briefly to the pros and cons of different kinds of income formulae.

The simplest way to compute compensatory payments would probably be to ask each family to tell the EVA how much taxable income it had reported to IRS in the previous year. A few parents might consciously attempt to understate their income in order to bring their school more money. Such fraud is not likely to be common, however, for while the EVA could not in fact compare parental reports to IRS returns, few parents would believe this. If asked to list the amount appearing on their tax return, most parents would assume that their answer could and would be checked. Furthermore, the benefit to the parent or child from a slightly inflated voucher would only be large if an overapplied school gave preference to children with high vouchers or if the school were very small. In a small school, it might be tempting for parents to conspire to understate their incomes. If a big enough percentage of parents did this, they could substantially affect their school's total income. The chances that such collusion would be discovered are also great, however. Without collusion, an individual's dishonesty would yield such a negligible increase in per pupil expenditures at a school as hardly to be worth it for most parents.

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[1] Research on inequality in America has consistently shown that black children are more disadvantaged with respect to test scores than with respect to any other criterion, including income, occupational status, and the like. This is not so true for other minorities.

Administrative costs of collecting income declarations would depend on the amount of explaining and checking done by the EVA, and on whether collecting the information was part of some other activity. If parents were expected to appear at the office of the EVA to collect the voucher and submit their choices for schools, they could be asked to complete questionnaires at that time. If parents appear at the school on the first day, the process could take place at that time. In the second situation, however, the data might be less trustworthy. The school would be giving directions and collecting the data for the EVA, and it would be tempted to encourage underreporting so as to claim larger numbers of "disadvantaged" children. In either case, administrative costs would be limited to the cost of printing, assisting parents with the questionnaires, tabulating data, calculating payments, etc.

It should also be noted that in computing a school's compensatory payments, average parental income would not be an appropriate figure. If all parents' incomes were simply averaged, one rich parent would offset many poor ones. From the school's viewpoint, this would make enrolling a very rich parent enormously costly - so costly that no school would do so voluntarily. The general approach suggested in Section I was to treat all parents earning an average income or above the same. Compensatory payments would be a function of the number and incomes of parents in the below-average categories.

If the EVA did not want to ask for income declarations, it might simply decide to provide "bonus" vouchers to AFDC children. This leaves the task of collecting income data to the local welfare agency, and the EVA would not have to bother parents with questionnaires, etc. The EVA could not, however, designate children who were not AFDC children, although many have serious educational problems. A system of this kind would probably result in substantial discrimination against non-welfare children who seemed to have educational problems.

The local EVA might also provide increments to children living in census tracts with low median incomes, high unemployment, many broken homes and so forth. The EVA would still have to collect information on where the child lived, determine his census district, and tabulate the data. This would be expensive. Still, it would spare the EVA from having to ask parents to declare their income.

In many cases, the fact that a child lived in a poor census district would indicate educational handicap. The correlation between residence and educational problems is, however, somewhat lower than the correlation between individual income and educational problems. Thus there would be somewhat more chance for schools to pick easy-to-educate children from low-income areas, while discriminating against hard-to-educate children from high-income areas. Still, a formula based on residence is likely to be almost as accurate as one based on income, and it is certain to be much less controversial.

C. Summary

All existing classification systems for identifying children with special educational needs could be continued under a voucher system. In addition, a system should be developed for augmenting the voucher of "normal" children with special educational problems. The best system, in our judgment, would be one which augmented the vouchers of children who had characteristics that the average school defines as "undesirable", since such a system would be most effective in reducing discrimination against disadvantaged applicants. The schools themselves ought to have a large voice in developing the formula, since a formula they judge "fair" will also be a formula that minimizes discrimination.

Our guess is that the most effective formula would be one which based a school's payments on the average test score of its entering students. This formula would probably also be the most controversial. The next most effective formula would be one which based payments on family income, as reported by parents to the EVA. This formula might or might not be less controversial than one based on test scores. The least controversial formula would be one which based the value of a child's voucher on the characteristics of the census tract in which the child lived. Such a formula would also be less effective in curbing discrimination against applicants who appeared likely to be slow learners or to cause trouble in class.

8. Problems in Matching Pupils to Schools

A. Preventing Segregation

A voucher system greatly increases parents' control over which school their child attends. The rationale for this change is that parents should have more choice about the type of program their child is exposed to. But it is also likely that some parents will try to use their vouchers to control the type of classmates their children are exposed to. Minority parents may try to use vouchers to send their children to predominantly white schools, while white parents may try to use vouchers to send their children to all white schools.

This appendix deals with two issues: (a) methods for predicting whether the schools in a given community will become more or less racially segregated under a system such as that recommended in Section I; and (b) devices which might be adopted for ensuring integration in the event that the system proposed in Section I proved inadequate.

a. Predicting Changes in the Level of Segregation

Whether a voucher system would increase or decrease the level of segregation in a given area depends on three factors:

(1) The level of segregation in public and private schools at the time the voucher system is established. This depends on the degree of residential segregation; on the extent to which the school board has gerrymandered attendance zones either to maximize or to minimize school segregation; on the extent to which public schools enroll children from outside the neighborhood; and on the proportion of blacks and whites in private schools. If segregation is nearly complete at the outset, a voucher system would almost inevitably bring some desegregation. If the schools are fully integrated at the outset,

a voucher system would almost inevitably produce more segregation.

(2) *The proportion of all parents who make their educational choices primarily on the basis of schools' racial composition*. This proportion is likely to be high if schools' programs are essentially similar, since parents then have no basis for choosing among schools other than the characteristics of the students. If schools have radically different programs and instructional styles, the mix of students is likely to be of less importance to many parents. If schools develop substantially different programs that appeal to parents of both races, the level of segregation will fall. If their programs differ in ways that attract one race but repel the other, segregation will rise.

(3) *The proportion of parents who would prefer a school more integrated than the one their children now attend*. This will depend largely on the attitude of the black community. If most blacks in an area want their children to attend integrated schools and are willing to have their children travel the necessary distance to reach such schools, the typical voucher school will be more integrated than the typical public school was before. If most blacks are not interested in integration, or if they are not interested enough to have their children bussed to distant schools, the level of integration will not rise. If most whites prefer segregated schools, and if blacks do not want to attend white voucher schools, the level of integration will fall. This is particularly likely if whites in racially mixed areas are willing to have their children bussed to schools in all-white areas, while blacks in these same mixed neighborhoods are not willing to have their children bussed to white neighborhoods. If all parents, both white and black, wanted to send their children to segregated schools, schools would end up severely segregated unless there were controls in the system designed to negate parental preferences. If, on the other hand, all minority parents wanted integrated schools and applied to the same schools as whites, all schools would end up integrated - *regardless of what whites did*. (If white parents accepted integration willingly, minority parents would not all have to apply to schools in white areas in order to achieve integration.)

It is unlikely that any area will have all whites or all blacks who want either segregated or integrated schools. One can make some guesses about the likely distribution of preferences on the basis of 1968 interviews of 5,000 black and white adults in 15 major American cities. Among blacks, 1% preferred all black schools; 48% preferred schools which were half white and half black; 37% felt it made no difference; 8% preferred mostly white schools; and 6% did not know.[1] A similar question was not reported for whites. Whites were, however, asked another question that gives a fair indication of their preferences (if race is the dominant factor in their school selections). Whites indicated that if they had small children, 33% would prefer that the children have only white friends; 46% did not care; 19% preferred black and white friends, and 2% did not know.[2]

There is some indication that white attitudes toward integration are improving. Comparable surveys taken in 1942, 1956, and 1963 should a marked growth in the proportion of whites who have pro-integration attitudes.[3] While this trend may not have continued since 1968, it seems unlikely to have been dramatically reversed.

The above estimates are averages for 15 cities. Any given city might deviate substantially from these norms. The questions are, moreover, not directly related to the kinds of choices available in a voucher system. A locality contemplating adoption of a voucher system might, therefore, want to conduct a local survey which dealt directly with such issues.

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[1] Angus Campbell and Howard Schuman, "Racial Attitudes in Fifteen American Cities," in "Supplemental Studies for the National Advisory Commission on Civil Disorders," June, 1968, p. 15.

[2] Ibid., p. 34.

[3] See Paul B. Sheatsley, "White Attitudes Toward the Negro," Daedalus, vol. 95, no. 1, p. 217 (using survey data from the National Opinion Research Center).

A second major factor affecting judgments about the effect of a voucher system is the level of segregation before vouchers are adopted. Where schools are fully desegregated (as they are in Berkeley, California or in the Richmond District in San Francisco, due to a quota system), a shift to vouchers would almost inevitably increase segregation, since the tastes of black and white parents differ somewhat. Where the schools are completely segregated, there would inevitably be a decrease in segregation. White parents could not make a "whiter" choice, since their children are in "white" schools from the start. The level of integration would depend on the number of minority parents who selected integrated schools. The survey data reported above suggest that substantial numbers would do so in most communities.

Combining knowledge about parent preferences and the level of segregation in a community, one can develop various indices of "change in segregation".[4]

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[4] The simplest measure of racial segregation for a community is the ratio of the between-school variance (V_b) in racial composition to the total variance in racial composition (V_t), where race is a dochotomous variable. If all schools have the same racial composition, there is no between-school variance and $V_b/V_t = 0$. If every school is either all white or all black, the between-school variance is equal to the total variance (there being no within school variance), and $V_b/V_t = 1$. If we compare this index before the experiment (V_{bb}/V_{tb}) with the same index after the experiment (V_{ba}/V_{ta}), we have an index of change (C):

$$C = \frac{\frac{V_{bb}}{V_{tb}}}{\frac{V_{ba}}{V_{ta}}}$$

Assuming no change in the racial composition of an area, the total variance of racial composition will be the same before and after the experiment, i.e., $V_{tb} = V_{ta}$. Our index thus reduces to $C=V_{bb}/V_{ba}$.

Putting this another way, if we compute the percentage of whites in each school, weight each percentage by total enrollment in the school, and compute the standard deviation of the resulting distribution, any increase in the standard deviation represents an increase in segregation, while any decrease in the standard deviation represents a decrease in segregation. This is only another way of saying that if schools' racial mixtures become more similar under a voucher experiment, there will be less segregation. If their racial mixtures become less similar, there will be more segregation.

If we want to predict the effect of a voucher system on the level of segregation, we can make a first approximation from simple survey data. If we first ask eligible parents the racial composition of their child's present school, if we also ask what racial composition the parent would prefer, and if we assume racial composition is the only factor influencing parental choices, we can predict the effects of honoring parental preferences.[5] If the average parent wants to transfer his child to a school in which the proportion of blacks more closely approximates the proportion of blacks in the total population of the city, honoring preferences will result in more integration. If most parents want to transfer their children to schools which are more segregated than their present schools, honoring preferences will result in more segregation. Such predictions assume, of course, that parents are only interested in the racial compositon of schools rather than in schools' programs. This one-dimensional view of parental thinking may be too pessimistic. If it is, a survey of the kind we are discussing could be very misleading, since it could not easily take account of other qualitative differences between schools. A misleading survey could, moreover, be worse than no survey at all.

b. Controlling the Racial Composition of Schools

An EVA could establish regulations designed to increase or decrease segregation relative to the "natural" level arising from parental preferences. These regulations fall into two categories: those that encourage parents to apply to certain kinds of schools and those that encourage schools to select certain students. We will take up these two approaches up in order.

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[5] Parents are unlikely to have a very accurate notion of the racial mix of their children's schools, but errors of this kind would not appreciably bias inferences from such a survey unless they took very unusual forms.

(i) Influencing Parental Choices

One way to influence parental choices is to make the cost of attending one kind of school greater than the cost of attending another. Were schools permitted both to cash a student's voucher and to charge the same student additional tuition, some schools would price themselves beyond the reach of most minority parents. A voucher system which allowed tuition charges would thus be more segregated than one which did not. It would probably be more segregated than most existing public systems. For this and other reasons discussed in Chapter 2, we will assume that any federally funded voucher system should prohibit such charges. Indeed, it is conceivable that the federal courts could hold a system which allowed tuition charges unconstitutional, on the ground that it promoted segregation.

Another conceivable device for affecting parental choices is to deny parents information about schools' racial composition. Efforts to do this are, however, likely to be ineffective. Too many clues would guide parents. Schools located in all-black or all-white neighborhoods would receive large numbers of applications from their immediate area. Schools offering Swahili and Black cultural studies, or schools with predominantly black faculty, would receive many black applications and few white ones. Schools which had been predominantly white in the past would attract many applications from whites.

In theory all racial clues could be eliminated from school descriptions. In the absurd form, schools would receive a number and parents would make their selection on the basis of a written description of the school, which omitted even the school's name. Parents would also have to be forbidden to visit schools they were considering. They would also have to be denied information on schools' locations, and hence on the time required for the child to reach school each day. Such a system seems to defeat the purpose of vouchers, making parental choices a charade. If vouchers are to work, parents need maximum possible information, including information about the race of pupils and teachers.

We conclude, then, that attempts to influence the schools parents choose are unlikely to prove fruitful.

(ii) Influencing School Recruitment

Current interpretations of the Constitution (see Appendix B) make it clear that any school receiving voucher funds would have to be able to demonstrate that it did not discriminate against applicants on the basis of race. Since drafting Section I, we have concluded that the only practical way to police such a requirement is to require that the percentage of minority group students admitted to each school be at least as large as the percentage of minority group applicants to that school. Furthermore, for the reasons outlined in Chapter 3, we think it would be desirable to require that schools fill at least half their places by a lottery among applicants.[6] If a voucher system includes these admissions requirements, the major remaining issue is how to get schools to recruit a mixed student body rather than all blacks or all whites.

Chapter 2 recommends that "educationally disadvantaged" children receive larger vouchers. Regardless of the method of identifying the disadvantaged, (e.g., income tests, standardized "ability" tests), minority children will probably be over-represented in the disadvantaged category. As a result, schools which recruited more minority children would receive more funds. This should somewhat encourage minority recruitment. To the extent that white parents are now reluctant to see their child in a non-white school because the school is underfinanced, this aspect of a voucher system would encourage desegregation. To the extent that white parents are opposed to integration under any circumstances, these payments would be irrelevant.

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[6] If these recommendations were followed, schools would fill their places as follows. A school would first compute its percentage of minority applicants. It would then fill half its places in such a way as to ensure proportional representation of minority applicants, while allowing free play to whatever other criteria it though appropriate. Then it would conduct a lottery among the remaining applicants for the remaining places. If the general level of suspicion in a community were high, and the EVA wanted to ensure adequate minority representation among the pupils selected in the lottery, it might require each school to separate applicants by race and then draw proportionately from each group. (This would be equivalent to a stratified random sample.) Without this precaution, the luck of the draw could result in occasional over-representation or under-representation of minority applicants in a given school.

The EVA could also try to encourage racial balance by increasing the redemption value of vouchers cashed by schools which approached some "ideal" mix. The major problem with such incentives is that they would preclude payment of extra funds to a school which had a high proportion of minority pupils and was unable, rather than unwilling, to attract white applicants. Schools in black neighborhoods are unlikely to attract many white applicants no matter how hard they try, so there is little use in penalizing them economically if they fail. Such schools are, moreover, likely to have high proportions of children with educational handicaps, and therefore to need extra funds.

Making extra funds dependent on the proportion of disadvantaged students in a school provides the same incentive to middle-class schools as a "racial balance" bonus. It discourages a disadvantaged school from recruiting advantaged students, but the economic cost of middle-class recruiting is unlikely to dissuade most educators from attempting it if they can. The disincentive to middle-class recruiting could, moreover, be completely eliminated by putting a ceiling on per pupil payments to any school. A school might, for example, receive its maximum payments per pupil when it enrolled 50% disadvantaged, and might get no more for additional disadvantaged pupils. But again, this would penalize the involuntarily segregated school.

(iii) Direct Intervention by the EVA

If there were genuine concern over the possibility of de facto segregation, one way to ensure integration while preserving free choice would probably be to do a "dry run" of the selection procedure.[7] Such a test might reveal that the overall level of segregation would diminish in a voucher system. If, however, the "dry run" revealed that two or three schools would be highly segregated, the EVA could concentrate on helping these particular schools to achieve a better racial balance. The form of this "help" would depend on the political circumstances.

> Example No. 1: A "dry run" might reveal that a public school which had previously been all-black would receive no white applicants in a voucher system. The school might also receive relatively few black applications. The school board might respond to this by trying to contract with a biracial community group dedicated to school integration to run the school.

> Example No. 2: A "dry run" might reveal that a privately-operated school would have no non-white applicants. The EVA could help the school recruit non-whites, advise the school to admit non-whites to its governing board, or in other ways help the school become more appealing to non-whites. If the school refused to make any effort to integrate, the EVA might eventually declare it to be operating on a discriminatory basis and might refuse to cash its vouchers.

(iv) Racial Quotas

If an EVA were absolutely committed to racial integration, it could establish racial quotas and refuse to cash vouchers from any school whose racial compositon deviated by more than a specified amount from the average for the EVA's jurisdiction (or from some other arbitrary target). If the EVA's jurisdiction were 35 percent black, for example, the EVA might refuse to cash vouchers from any school that was less than 30 percent or more than 40 percent black. A more permissive EVA might accept schools between 10 and 50 percent black. In the extreme case, an EVA might simply require schools to be "racially heterogeneous".

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[7] Parents might not make the same choices in a "dry run" as in a real situation, but a well-designed test should eliminate deliberate false replies. If this seems to be a real danger, the "dry run" could be an actual first run, the results of which would become permanent unless declared invalid by some predetermined standard.

In order to see how a racial quota system might operate, let us take the simplest case, in which there is no excess capacity and in which the EVA allows no deviations whatever from the district-wide racial mix. Suppose, for example, that a district is half black and half white. Suppose further that the district is entirely segregated by neighborhood. Suppose that a quarter of the black parents want their children in integrated schools in white areas, even if this means bussing, that half want integration but not at the price of bussing, and that a quarter oppose integration. Suppose that all white parents oppose sending their children to schools in black neighborhoods. In order to cash vouchers, a school must be half black and half white.

When schools examine their first choice applicants, those in white neighborhoods will find that they are overapplied, since they will have attracted all the whites and a quarter of the blacks. Those in black neighborhoods will be underapplied, since they will have three quarters of the blacks and no whites. Since schools know there is no surplus capacity, they know they will all eventually be full. They therefore know exactly how many blacks and whites they can accept. When the first round of applications is completed, the schools in white neighborhoods are three quarters full, having taken as many whites as they are allowed and having taken half as many blacks (i.e., all who applied on the first round). Schools in black neighborhoods will be half full, having filled all their black places and none of their white ones. In the second round, the blacks who failed to get into a nearby neighborhood school will have to apply to schools in white neighborhoods, while the whites who failed to get into a white neighborhood school will have to apply to schools in black neighborhoods. This will result in all schools filling their quotas and ending up racially balanced. It will also result in half of all whites being assigned to a school in a black neighborhood which they did not want to attend, and a quarter of all blacks being assigned to a school in a white neighborhood which they did not want to attend. Were this to happen, it seems likely that the school board would be forced out of office and the experiment terminated.

The foregoing example is admittedly somewhat fanciful, since a community with the racial attitudes just described is unlikely to adopt a system with rigid racial quotas - or any racial quotas at all. If there were a more favorable attitude toward integration, neighborhoods would presumably be more integrated and more parents would voluntarily choose mixed schools outside their own neighborhoods. Racial quotas would not force as many parents to put their children in schools not of their choice, and the quotas would therefore be less unpopular. But racial quotas would also be less necessary in a community which was sympathetic to integration, since an appreciable measure of integration could be achieved without quotas.

The hard fact is that insistence on racial balance in every school is incompatible with guaranteeing every parent an equal chance of getting into the school of his or her choice. A racial quota system is likely to force large numbers of parents to enroll their children in schools which they very much dislike. This being so, a racial quota system is almost certain to be very unpopular among both blacks and whites. If it is imposed on a voucher system which purports to maximize parental choice, the result is likely to make everybody unhappy. A voucher system with quotas that force many parents to choose schools they regard as worse than the ones they had before would provide neither a fair test for vouchers nor a fair test for racial quotas.

Imposing racial quotas on a comprehensive voucher system, such as that proposed in Section I, would also generate serious administrative problems. One of the major objectives of a voucher system is to create more places in the kinds of schools that parents prefer, while reducing the numbers of pupils who have to attend schools their parents dislike. This means opening some new schools and expanding popular existing schools. It also means leaving some seats vacant in unpopular schools, at least in the short run. Since the overall system must have some excess capacity to achieve its objectives, racial quotas may have extremely bizarre results.

Let us return, for instance, to the imaginary community already discussed. Given parental preferences of the kind suggested, the logical thing to do in this community would be to expand public and/or private voucher schools in white areas, so as to create space for both the whites who want to attend such schools and the blacks who want to do so. All parents could then be assured of getting their children into the schools of their choice. If racial quotas are imposed on such a system, additional blacks will have to be bussed to white neighborhoods, against their will, in order to achieve racial balance in these schools. Conversely, many whites will still have to be bussed to black neighborhoods, because the places they preferred will have been involuntarily filled by blacks. Furthermore, some neighborhood schools may have to close entirely, because they will not get enough applicants of one race or the other to maintain both a 50-50 ratio and reasonable overall enrollment. The schools that have to close may be in black or white neighborhoods, depending on the precise order in which parents list the schools they do not want their children to attend. If blacks dislike schools in white neighborhoods less than whites dislike schools in black neighborhoods, the excess capacity in the white neighborhoods can be filled on a 50-50 basis, and some schools in black neighborhoods may have to close for lack of white applicants. If, on the other hand, whites dislike schools in black neighborhoods less than blacks dislike those in white neighborhoods, schools in black neighborhoods will be able to achieve racial balance, and "excess capacity" in white neighborhoods will go unused.

The administrative difficulties caused by racial quotas become even more serious if, as seems likely, an attempt is made to give schools some leeway in determining their exact racial mix. If, for example, the hypothetical community described above were to establish a quota system which allowed schools which were between 25 and 75 percent white to cash vouchers, all the excess capacity in white neighborhoods could be used. A few schools in black neighborhoods would get whites who could not find a space in a white neighborhood. A large number of schools in black neighborhoods would get no white applicants at all, even though they had appreciable numbers of black applicants. Such schools would either have to close or else would have to raise money outside the voucher system. Since there would be no room for their pupils in other voucher schools, they would presumably have to be supported from the regular receipts of the local board of education.[8]

Many of the problems implicit in racial quotas would be greatly reduced if the quotas were applied only to the private sector. Many advocates of quotas are primarily concerned about the possibility of segregated private schools (Ku Klux Klan or Black Muslim) getting public funds. A racial balance requirement for private schools would deal with this fear. The difficulty is that a rule of this kind would prevent almost all black community groups from starting neighborhood schools, even if they were in no way racist, simply because whites would not apply. This seems undesirable.

We conclude, then, that across-the-board racial quotas would reduce the number of parents who got their children into the kind of school they wanted, and that such quotas might create serious administrative and logistical problems. Racial quotas which applied only to privately managed schools would be less of a problem, both politically and administratively, but they would still make the establishment of new schools in black areas almost impossible.

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[8] The voucher bill considered by the California legislature in 1970 illustrates this problem. It contained a provision restricting the use of vouchers to racially mixed schools. It made no provision for public schools that got applicants of only one race.

B. The Need for Excess Capacity

So long as the debate over vouchers remains theoretical, discussion of their impact on racial segregation will be dominated by liberals who fear that they may promote segregation. Any voucher system actually adopted is therefore likely to contain fairly stringent theoretical safeguards against racial discrimination of the type outlined in Section I. As soon as an attempt is made to put such a voucher system into operation, however, a whole new debate is likely to begin, dominated by conservatives worried about integration.

The primary impact of a voucher system is to make parental preference rather than parental residence the basis for assigning students to schools. This would open a large number of hitherto white public elementary schools to black and brown applicants from outside the neighbrohood. Likewise, it would open public elementary schools in upper-middle class areas to less affluent white applicants from outside the area. There is no way of knowing how many disadvantaged families would actually apply to schools outside their neighborhood, but if a public school had a reputation for being one of the best in the city, it could get quite a lot of such applicants. The number would, of course, depend on transportation time, on the extent to which local ethnic minorities thought they could create good schools of their own in their own neighborhoods, and on whether public officials and private groups encouraged such applications.

If the number of "outside" applicants turned out to be large, overapplied public schools would probably find it difficult to expand enough to accommodate all applicants. They would therefore have to devise criteria for turning down certain applicants. For reasons already indicated, it seems essential that these criteria not be permitted to exclude black or brown applicants more often than white ones. This means that some white children might end up excluded from the public elementary school nearest their home, in order to make room for black or brown children from farther away. Of course, no child would be excluded from a school in which he was already enrolled, but children whose parents had expected to enroll them in a nearby public elementary school might sometimes be refused for lack of space. The frequency of such rejections would depend on the number of disadvantaged children whose parents wanted to enroll them in advantaged schools outside their own neighborhood, and on the willingness of these schools to expand their enrollment rather than becoming selective.

If middle-class children are excluded from the public schools in their own neighborhood, they must be assured a reasonably satisfactory alternative. Few parents will be willing to enroll these children in schools which enroll mostly poor children, especially if these schools are far away and in black or brown neighborhoods. Should such schools turn out to be the only available alternative, political resistance to the whole voucher system would probably become overwhelming, and the experiment would probably be halted.

In order to avoid a political debacle, a voucher system must result in the creation of new schools, or new places in old schools, which appeal to middle-class parents and to others with similar educational values and aspirations. There must, in other words, be an increase in the supply of what is widely believed to be "good" education. Otherwise, a voucher system will simply redistribute access to existing schools, increasing the opportunities available to the disadvantaged by reducing those available to the advantaged. While this is no doubt just, it is not politically practical in contemporary America.

The need for creating either good new schools or new places in good old schools has two practical implications. First, it means that a voucher system should not be put into operation without adequate lead time for setting up new schools. If an attempt were made to implement the admissions system recommended in chapter 3, or any other admissions system that was not blatantly discriminatory, and if no new places were available in "good" schools in the first year, there would be fierce competition for scarce places in desirable existing schools. The losers in this conflict would become bitter opponents of the system, and there might not be a second year.

Second, if new schools or new places in old schools are created, the overall system will end up with some excess capacity. Suppose, for example, that 20% of parents with children now attending public schools in low-income areas want to enroll elsewhere. These children's places in their present schools are not likely to be filled by outsiders. The schools in question will thus lose pupils. Many of them are, of course, now operating in excess of capacity. Nonetheless, the least popular public schools may well end up underutilized. If certain schools experience sharp enrollment drops, it may be possible to reallocate space within them to other groups. If, for example, several black public schools experience sharp enrollment drops, it may be possible to close one of them entirely for the duration of the experiment. And if part of the reason for this enrollment drop is that one or more black community groups is trying to start an independent voucher school, the public system may be able to lease its surplus school to such a group. Nonetheless, while savings of this kind will be possible in certain instances, there are also likely to be some unused facilities.

This is not necessarily as "wasteful" as some people assume. One of the prime problems with the present public system is that it tries to operate at 100 percent of capacity, or even more. This means it cannot allow parents much choice, because their choices are unpredictable and vary somewhat from year to year. New schools get built in poor neighborhoods, for example, in order to accommodate children who live in those areas. Later, some parents in these areas may decide they would rather have their children educated with middle-class children in middle-class areas. But there is often no room in the middle-class schools, because construction has been in the poorer areas. In order to respond to new demand, new space must be created, leaving some of the older facilities less crowded. To some, all this looks like "waste." In some ways it is. But flexibility of this kind is also a precondition for the political survival of a school system that is constantly confronted with new expectations and tastes.

C. Running a Lottery

A lottery of some kind is the only apparent way to prevent popular schools from creaming off the children with the fewest educational problems and leaving the difficult cases for underapplied schools. (Quotas for "problem children" would achieve the same result but would be harder to administer.) The EVA would have to determine how best to administer such a lottery.

Those whose primary concern is administrative efficiency will probably propose a centralized system. Under such a system each parent would list a series of school choices on an IBM card, in descending order of preference. These cards would be returned to the EVA, which would circulate duplicates to each school. Each school could then fill half its places from applicants who had listed it as a first choice. The school would notify the EVA (though not necessarily the parent) of its choices. These children's cards would be marked as having been allocated. The remaining cards would then be allocated by computer. The computer would compare the number of first choices given each school to the number of places remaining in that school, and would calculate the proportion of first choice students who could be admitted. It would then randomly select the appropriate number of students for each school from among those who listed it as their first choice.

After the first choice selection, many schools would be filled, but many would not. The computer would then repeat the same process, looking at the second choices of all students who had not been admitted to their first choice. Where the number of second choices given a school exceeded the number of remaining places, a random allocation would again be made. This process would be repeated until every child had been allocated to a school.

The computerized lottery would be fast and simple. The entire lottery could be carried out in a few minutes. It would be relatively simple for "experts" to police the system, ensuring that it operated as advertised. (One way to ensure that random selection seemed fair to parents as well as experts would be to pick students by birth date, perhaps using the same order of priority as the draft. This would also prevent any appearance of racial discrimination.)

Centralizing the process would also help the EVA ensure that the number of places available exceeded the number of applicants. If it did not, the EVA could inform the public schools that they should create additional places. It might also require private schools to open up more places in order to participate. These additional places could be created before the lottery took place.

A centralized, computerized procedure has the disadvantage that many parents distrust centralized, bureaucratic procedures. Many will assume the lottery is rigged, even if it is not. If the appearance of equity is to be achieved, it may be better to use a more localized approach. Each parent could, for example, go to the school of his first choice on a given night, and drop his child's name in a hat. A public drawing could then take place. This process could be repeated on successive nights for second and third choices. A school which did not have many first choices would have its unpopularity more widely advertised under this system, but by handling the lottery at a local level, parental confidence in the process might be increased. The use of a public drawing would be more difficult if a school had already filled half its places before the lottery began, since it would dramatize the distinction between students whom the school wanted and students it took by lot.

The foregoing discussion assumes that a lottery should be run in such a way as to give parents a substantially better chance of getting a child into their first choice school than into their second school, a substantially better chance of getting him into their second than their third choice, and so forth. This may or may not be desirable.

Suppose that a middle-class family in a middle class neighborhood is considering where to send a first grade child. There is a small, appealing private school in the neighborhood, but it has many applicants for a handful of places. There is also a large public school in the area, which is adequate but not as good as the private school. It has slightly more applicants than places, because a modest number of poorer children from outside the neighborhood want to attend.

If our hypothetical family applies first to the private school and second to the public school, the odds that the child will get into the private school are poor. When the second round of applications is processed, the odds that the public school will be filled are also high. The child may therefore have to attend a more distant and less desirable school. Foreseeing this, the family may not be willing to "waste" its first choice on the heavily applied private school. It may list the public school as a first choice instead, virtually ensuring admission to it.

The foregoing example suggests that considering all first choices before any second choices will result in fewer applications to overapplied schools. It may also limit these applications in a relatively rational manner, by discouraging applicants who do not feel that the difference between a heavily overapplied and a less overapplied school is big enough to justify the risk of not getting into either.

There is, however, an alternative approach to running a lottery, which would allow parents to list several "first choices", all of which would be initially treated as having equal weight. This is more or less the way many college admissions are now run. Instead of listing colleges by order of preference, students simply apply to all colleges they want to enter. Each college looks at its pool of applicants, makes its selections, and then waits for the students to make their selection among the colleges in which they have been accepted. A student's chances of getting into an exclusive college are no better if it is his first choice than if it is his last choice, since the college normally does not know where it stands in the student's view.

A similar arrangement would be possible in a voucher system for elementary schools. Parents could apply to a number of schools. Since the voucher system would not have application fees to discourage wholesale applications, the EVA might want to set a maximum number of "first" choices. The maximum might, for example, be four. The parent would then list four schools, in order of preference, with the EVA. The EVA would not report the order of preference to the schools, however, but would simply report that a given child had applied.

The schools would then make their choices, and establish a "waiting list" from which additional students could be admitted if any of the school's choices got into another school they liked better.

The schools would return these lists to the EVA, which would feed them into a computer, along with the cards containing the parents' preferences. The computer would determine which children had gotten into more than one of their preferred schools, and would allocate these children to the school their parents had given highest priority. These children's names would be eliminated from other schools' lists, and their places filled from the waiting list. If a student was admitted from a waiting list to a school that ranked higher in his parents' eyes than the one to which he had already been admitted, he would be assigned to his preferred school and his place in the other school would be filled by someone from its list. This cycle would be repeated until half the places in every school were filled. All duplicate admissions would be eliminated by admitting the child to the school his parents had ranked highest.

All students would then be allocated to the lottery pool for each of their preferred schools. Students who had already been admitted to a school would, however, be immediately eliminated from the lottery pool of any school that their parents had ranked lower on their preference list. Thus a student would have a chance of getting into a "better" school by lottery than the one that he had gotten into by the school's choice, but he could not end up in a "worse" school than the one that had picked him.

The computer would then make random selections of students from each school's lottery pool. Each time a student who had already been admitted to one school got into another school his parents preferred, his space in his former school would be opened up again. Each time a student was admitted to a school by lottery, his name would be dropped from the lottery pools of all schools his parents had ranked lower, but would be retained in the lottery pools of schools his parents ranked higher. Proceeding in this way, the computer could fill all slots extremely rapidly.

A system of this kind would encourage people to apply to several different schools, since their chances of getting their child into their second choice school would not be reduced by having listed another school as a first choice. The system would have the vice of being almost incomprehensible to the average parent, however. It would therefore be subject to charges of corruption. Also, it is not entirely obvious that the resulting distribution of places would be more satisfactory to most parents than the distribution which would result from granting all first choices before any second choice. The calculus of social satisfaction required to decide among these alternatives has yet to be invented, so it seems best left to local political decision.

D. Late Applicants

Late applicants pose special problems in a voucher system. Such applicants will fall into two categories: those who failed to apply at the normal time because they did not know they were supposed to apply or did not get around to it, and those who failed to get their children registered at the required time because they did not live in the demonstration area at that time. Such students could constitute an appreciable proportion of the total student population in certain urban areas.

In an area of stable population but high turnover, the problem of recently arrived students should be more or less taken care of by recent departures. If a lottery takes place in April of any given year, some of the students admitted to any given school will leave the area before September. Each school, whether it was intially overapplied or underapplied, will therefore have some vacancies in September. Recent arrivals can be given a list of these vacancies, and they can then apply to whatever schools they like. An admissions process identical to that of the previous April could then be followed.

Problems will arise under three circumstances: (1) parents who are planning to leave the area may not bother to apply in April, so that their departure may not create any extra space in desirable schools; (2) parents who remain in the area may not bother to apply until September; (3) more children may move into the area between April and September than move out.

To cope with these problems, the EVA will have to estimate the number of students likely to be living in the area the following September, and will have to ensure that enough places are available for all such children. This could be done in one of two ways. One possibility would be to enter "dummy applications" for late comers into the same pool as regular applicants, ensuring that there would be some places for these children in the "desirable" as well as the "undesirable" schools. The other possibility would be to let old residents more or less monopolize places in "desirable" schools, except insofar as vacancies were created by late withdrawals. New residents would then have to attend "undesirable" schools in their first year. In subsequent years, they could compete with everyone else for any vacancies created by turnover in "desirable" schools.

9. Problems in a Demonstration

A. Phasing Into a Demonstration

Any district which establishes a voucher system for financing education will face a number of special problems during the transitional years. It will have to decide what grades to include in the new system each year. It will have to decide how to handle the financing of children admitted to schools under the old system. It will have to live with considerable uncertainty in the first few years both about the total enrollment in public and private sectors and about the enrollment in specific schools, and it may have to work out arrangements for handling the special costs of starting new schools and of reduced enrollment in old schools. Part A of this chapter considers some alternative solutions to these problems.

a. Selection of Eligible Grade Levels

The voucher system recommended in Section I is designed primarily for children between pre-school and eighth grade. The selection of specific grades to be included in a demonstration depends largely on local conditions and need not be this broad.

At first glance it might seem both cheapter for OEO and less disruptive to the community if the EVA decided to phase into a demonstration one grade at a time. If this were done, the EVA in its first year would provide vouchers only to children entering school for the first time. These might be kindergarteners, if kindergarten attendance were general in the area, or they might be first graders. In the second year the system would embrace two grades; in the third year it would embrace three; and so forth. In the early years of the demonstration, children in the higher grades would be admitted and financed under whatever ground rules had prevailed prior to the demonstration.

In public schools they would presumably continue to be financed from regular public school funds, which would not pass through the EVA. They would also continue to be admitted on a neighborhood basis, or whatever variant the local board of education had previously used. In private schools, children in the higher grades would be admitted by whatever criteria the private school wished to employ, and would be financed by tuition charges or whatever scholarship funds and subsidies the private school could collect. This would also apply to new schools, which would either have to begin with one grade, wait several years to get going, or recruit older children under other arrangements.

Phasing in one grade each year has serious drawbacks. First, it would be almost impossible to start new schools for a cross-section of the population during the first years of the experiment. For both economic and pedagogic reasons, almost every school wants to cover more than one grade, even in its first year. This does not mean that a new school must start with all the grades it will eventually have. But schools will want to start with more than one grade, and a demonstration should permit this. A district with a K-6 elementary system, for example, might want to cover all seven grades eventually, but it might start by covering K-3 so as to allow the establishment of new primary schools. It might then add one grade each year until K-6 coverage was achieved.

A second major disadvantage of starting one grade at a time is that full public school participation might be delayed until coverage was extended to all grades. In order to work effectively in the public sector a voucher system requires that each school's budget reflect the value of the vouchers held by the children it enrolls. (This does not, of course, preclude "overhead" charges to each public school for services provided by the central administration.) As long as vouchers were used for only a few grades, a public school would still have to cover most of its costs through traditional arrangements. The school board would therefore be less likely to decentralize budgetary decisions. Instead, it might simply add each school's voucher receipts to the district's general funds and go on allocating funds between schools as before. Public schools which attracted extra voucher students might not actually get any budget increase. This would eliminate the incentive for public school principals and teachers to change their school so as to attract new applicants. For such incentives to work, the board of education would have to give individual schools their own budgets, based on their voucher income less some fixed overhead charge.

The best way to encourage innovation early in a demonstration would probably be to cover all grades of the existing public elementary schools from the beginning of the demonstration. A system which began with, say, K-3 and then expanded one grade each year would at least allow new schools to spring up, though it might not have the desired impact on existing schools. A system which began one grade at a time would be least likely to produce change.

b. Children Already in School

In order to survive politically the EVA must allow participating schools to give first preference to applicants already enrolled in the school, even if these children were originally accepted under a highly inequitable admissions system which had none of the "open enrollment" features recommended in Chapter 3. The one exception to this might be schools which had previously accepted students in a racially discriminatory manner. Such schools might be required to make new places for an appropriate number of minority applicants in the higher grades in order to cash vouchers for children at any grade level.

Assuming that schools are allowed to retain older children already enrolled, the question remains whether the EVA should cash vouchers from such children. We will consider three options, in descending order of preference.

(1) The EVA cashes older children's vouchers at full value, regardless of how the children originally came to the school. It insists on "open enrollment" only for children entering a school for the first time. It thus takes some years for the admissions system described in Chapter 3 to take full effect.

The principal objection to subsidizing everyone is that it will cost the federal government more money. Some of this money will go to "undeserving" parents who got their children into good private schools only because they could afford the tuition when others could not. While this objection is of some consequence, the number of parents who have "bought" their children's way into existing private schools is relatively small, especially in the most likely target areas. Given the administrative and political advantages of subsidizing everyone from the start, and the relatively modest savings to OEO from most of the plausible alternatives, this approach may be best.

(2) The EVA cashes older children's vouchers at full value, regardless of how the children originally came to the school, so long as they are in a public school. It cashes vouchers for children in private schools only if they have been admitted under a non-discriminatory, "open enrollment" procedure established by the EVA.

It might be objected that this alternative makes an arbitrary distinction between public and private school children. The reason for this is that the admissions system used by the public schools prior to setting up an EVA, while discriminatory in the same manner and degree as the real estate market, is probably less discriminatory and certainly seen as more legitimate than the admissions systems now used by most private schools.

In addition, since every child in public school attends free, cashing all public school children's vouchers does not provide any new "windfall" benefits to private individuals. Private school parents could only cash vouchers if they were willing to give up their child's guaranteed place in his present school and compete for places with everyone else on a fair basis. This avoids subsidies to parents who can afford to pay for their children's education, while subsidizing everyone who needs help and is willing to accept an equitable system of allocating scarce spaces. There are, however, certain administrative problems.

Imagine a Catholic school in which tuition is lower than the voucher's redemption value. Such a school would presumably want to get as many parents as possible to forego their absolute right to keep their child in the school. The school would want such children to reapply on a competitive basis, since the school could then get substantially more money for these same children's education. Since half the school's places could be filled at its own discretion, even under the "open" system, it might get some parents to withdraw their children and guarantee them places when they reapplied.

Conversely, imagine a school which charged tuition higher than the redemption value of a given child's voucher. Such a school might open up a certain number of places for voucher students simply in order to diversify itself. If this happened, some parents might want to withdraw their children and reapply, in order to save themselves tuition. The school, in order to discourage this, might let it be known that it would take none of these children voluntarily - though of course it might end up taking some when it filled its places by lot, or if it had no surplus applicants and had to take everyone.

(3) The EVA cashes older children's vouchers at full value only if they change schools. Children who remain in the same school are handled by traditional arrangements. Those in public schools are paid for at the same per pupil rate as before the demonstration. Those in private schools are not paid for from tax funds.

The rationale for this approach is that if schools are allowed to cash vouchers for children already enrolled, these children will always have an unfair advantage over outsiders seeking admission, no matter what contrary appearances may be created. Schools will tend to readmit their former students in one way or another, and OEO will simply end up subsidizing the results of earlier injustices.

This argument may be correct. If the public school system were assured of receiving OEO augmented vouchers for disadvantaged youngsters who did not move, it might try to persuade their parents to apply to the child's present school, in order to avoid crowding middle-class children out of "desirable" schools. If compensatory payments were available for older children only if they actually moved to a new school, the public system would have an incentive to make additional room for such children in "desirable" schools. Similarly, private schools would have an incentive to recruit new kinds of children, since they could not get voucher funds for older children already enrolled.

The effects of these incentives would diminish over time, since all entering children would be eligible for voucher payments if admitted under an open system, and would remain eligible even when they stayed in the same school. The initial impact of confining payments to transfer students might nonetheless be to shake up the system and open new places for disadvantaged children.

This approach has two disadvantages. First, it puts a premium on establishing "new" schools, none of whose pupils were enrolled prior to the experiment and all of whom are therefore eligible for subsidy. One can imagine a rash of school "bankruptcies", followed by the sale of school buildings to new groups, reopening of the schools with largely similar staffs, and readmission of similar student bodies. No useful purpose would be served by this kind of legal charade. In addition, a system which pays for older children only if they transfer puts successful established schools at an unfair disadvantage. If parents of disadvantaged children genuinely prefer their present school, it seems unreasonable to deny this school compensatory funds that are going to other schools for educating the same children.

These considerations lead us to three tentative conclusions:

(1) Participating schools should be allowed to give first preference to children already enrolled in the school, even if these children were not origianlly admitted under an equitable "open enrollment" system such as that proposed in Chapter 3.

(2) Participating public schools should be allowed to cash all children's vouchers.

(3) Participating private schools should be allowed to cash all children's vouchers if most private school children had previously been admitted under a relatively equitable non-discriminatory system. If most private school children had previously been admitted under a system seriously tainted by racial or economic discrimination, private school vouchers should only be cashed for children admitted under rules laid down by the EVA.

c. Predicting Enrollment

Part A of Chapter 8 suggested the possibility of conducting some kind of survey before the beginning of an experiment to see where parents think they will enroll their children. This would be useful not only in dealing with possible racial imbalance, but also in forecasting overall enrollment and dealing with logistical problems. A spring admissions deadline for most students would also facilitate planning. Once the system had been in operation for a few years, schools would be able to make moderately accurate forecasts of next year's enrollment patterns simply by looking at the present pattern.

d. Special Costs of Phasing In

Federal funds should be available to take care of any increase in per pupil costs in the public system caused by lowered enrollment. These costs might include (1) costs of maintaining and amortizing physical facilities, if these cannot be leased to other schools; (2) costs of maintaining necessary central staff; (3) retention of any "surplus" tenured teachers; (4) costs of maintaining pension or other rights for public school teachers who leave to teach in privately managed voucher schools during the demonstration. These issues are examined in Part B of this chapter.

Federal funds will also be needed to cover start-up costs for new schools. Most new schools will want to lease facilities rather than buying them. These costs should be covered by calculating the basic voucher to include the cost of "rent" or "amortization." But new schools may still have trouble getting loans for renovation of leased facilities, even if the voucher is large enough to repay such costs over 5-8 years. The EVA may have to guarantee such loans, if new schools are to start. This means the EVA will have to establish a mechanism for deciding which loans to insure.

Seed money for technical assistance and one or two salaries may also be critical to helping new schools get off the ground, even if this money is also in the form of loans.

Loans could be made contingent on community interest. A would-be school might, for example, be required to obtain signatures from an established fraction (say a quarter) of its intended enrollment. Each signature would be an expression of the parents' intent to enroll an eligible child in the would-be school. Upon validation of these signatures, the EVA could make a small loan. Later, with more parental commitments, it might loan more.

B. Financial Consequences of a Demonstration for the Public Schools

Because of the non-uniformity of bookkeeping practices, as well as wide variation in the level of support for education, no analysis of the budgetary consequences of the voucher demonstration project is universally applicable. The following discussion considers some general issues and then illustrates the possible consequences of a demonstration for one particular school district (a district which has not, in fact, shown any interest in participating).

A superintendent considering the consequences of his district's participation in the voucher demonstration project might ask the following questions:

a. Would there be overall gain or loss in public school revenues?
b. How much would revenue per pupil increase?
c. How much would costs per pupil increase if enrollment fell?
d. How much extra money would the public schools get to finance innovation, in order to meet the challenge of competing schools?

a. Overall Revenue

In order to predict the net gain (or loss) to the public schools, the superintendent must make certain guesses about enrollment trends. Once he has done this, he can predict his overall gain or loss in the following manner.

i) To determine the amount that the public schools will contribute to the EVA, multiply the number of public elementary school students in the target area before the voucher program by the amount of the basic voucher.

ii) To determine the amount paid to the public schools by by EVA:

  a) Estimate the number of students who will remain in the public schools after the voucher program starts;

  b) Multiply this figure by the value of the basic voucher to determine the total amount of basic voucher money returning to the public schools;

  c) Estimate the average compensatory increment to the vouchers of disadvantaged students in the public schools;

  d) Estimate the number of disadvantaged students who will remain in the public schools;

  e) Multiply the number of disadvantaged children remaining in the public schools (determined in d) by the average compensatory voucher (determined in c) to find the total amount of compensatory voucher payments that will be made to the public schools.

  f) Add the figures determined in (a) and (e) to find the total amount paid by the EVA to the public schools.

iii) Subtract the amount paid by the public schools to the EVA (determined in step i) from the total amount paid by the EVA to the public schools (determined in step iif) to find the net gain (or loss) to the public schools.

Table III shows the net gain or loss to a hypothetical public school system under varying assumptions regarding the percentage of public school students remaining there and the percentage of those who are disadvantaged. The target area is presumed to have had 8,000 public school pupils before the demonstration, a total expenditure of $4.8 million, and hence a basic voucher of $600. All children from homes where income is below the median city income are defined as "disadvantaged", and compensatory vouchers are presumed to be available to all such children on a sliding scale. The average compensatory payment is presumed to be $300.

TABLE III

Net Income Gain (or Loss) for Public Schools Under Voucher Plan

		Fraction of Students Remaining in Public Schools				
		1.00	0.90	0.80	0.75	0.70
Fraction of Remaining Public School Students Who Are Disadvantaged	0.80	1,920,000	1,248,000	576,000	240,000	(96,000)
	0.75	1,800,000	1,140,000	480,000	150,000	(180,000)
	0.70	1,680,000	1,032,000	384,000	60,000	(264,000)
	0.60	1,440,000	816,000	192,000	(120,000)	(432,000)
	0.50	1,200,000	600,000	0	(300,000)	(600,000)

If, for example, 80% of the original public school students remain in the public schools, and if 75% of these are disadvantaged, the intersection of the vertical column headed 0.80 and the horizontal row labeled 0.75 shows that the public schools will have a net gain of $480,000, or ten percent of their initial budget. Figures in parentheses indicate losses to the public schools.

The steps which have just been described can be carried out in general mathematical terms, and the net gain or loss can be expressed by the following formula:

$$N = (r + crd - 1)(B)(V)$$

N = the net dollar gain or loss to the public schools

B = the number of public school students in the target area before the voucher experiment

V = the size of the basic voucher

r = the fraction of public school students who choose to remain in the public schools

d = the fraction of the remaining public school students who are disadvantaged

c = the ratio of the average compensatory voucher to the basic voucher

In the example worked out on the previous page, we have assumed that:

B = 8,000

V = $600, and

c = .5

The numbers appearing in the chart are then simply determined by plugging in the various indicated values or r and d.

b. Revenue Per Pupil

Since the basic voucher will be roughly equal to the current cost per pupil, and since each student returning to public school will contribute his voucher, the public schools' revenue per pupil cannot drop below its previous level. Indeed, the revenue brought in by compensatory vouchers will inevitably cause a significant increase over the present per pupil income.

In the hypothetical school system shown in Table III, expenditures had been \$600 per student. The average compensatory voucher provided by OEO was \$300. If 80% of the original public school students remained there, and if 75% of these students were disadvantaged, the income of the public school system would rise to \$825 per pupil.

In general, we can determine the revised per-pupil revenue by finding the revised public school revenue (the sum of the basic voucher plus compensatory voucher revenue) and dividing this figure by the number of students remaining in the public voucher schools.

If this procedure is carried out mathematically, we find that the new revenue per voucher student in the public schools is simply

$$R = (1 + cd)\,V$$

where

R = revenue per voucher student in the public schools,

V = the basic voucher size,

c = the ratio of the average compensatory voucher to the basic voucher, and

d = the fraction of the remaining public school students who are disadvantaged.

If we apply this formula to a target area where the basis voucher, V, is \$700, the average compensatory voucher is \$350 (i.e., $c = .5$), and 70 percent of remaining students are disadvantaged ($d = .7$), then the revised revenue per student will be:

$$R = (1 + (.5)(.7))\ (700) = \$945$$

c. Costs Per Pupil

The effect of a voucher system on apparent costs per pupil will depend on bookkeeping procedures as well as real changes in costs. Let us consider the 1970-71 budget of a small city which we shall refer to as Midburg. The total school budget for Midburg is \$16,075,000. This covers a system of 16,920 students, 10,170 of whom are in elementary school. If we divide the total budget by the total number of students, we find that the overall cost per student is about $950. About $4,245,000 of Midburg's budget represents debt service, central administration, building maintenance, and other "fixed" costs which are not subject to change when enrollment drops. The other $11,830,000 covers salaries of teachers, principals, supervisors, librarians and school secretaries, and expenditures for textbooks, library books, teaching supplies, miscellaneous supplies, truant officers, health services, and transportation costs. These are "variable" costs which rise when enrollment rises and decline when enrollment declines. Thus the "variable cost" per student in Midburg is about $700, while the "fixed cost" is about $250 per pupil. These figures are averages for the whole system, including secondary as well as elementary schools. Both "fixed" and "variable" costs would be lower if separate data were available solely for elementary schools.

If 1,000 of the 10,170 elementary school students chose to leave the public schools, the schools might save as much as $700,000 (1,000 students times variable costs of $700 per student). This is a maximum saving, however, and is not likely to be fully realized in most situations. Midburg has one teacher for every 19 pupils, for example, but it could not necessarily cut its teaching force by one teacher every time 19 pupils left, any more than it would necessarily increase its teaching force by one teacher whenever 19 pupils were added. If 1,000 pupils left, Midburg would probably be able to save something like $530,000 on teacher salaries, librarians' salaries, textbooks, library supplies, and fringe benefits. (If an entire elementary school could be closed, it could save another $120,000, and if the school could be leased to a private group, there would be a further saving.) Overall, then, it appears that a ten percent reduction in Midburg's elementary school population would allow the district to save about $530 out of the $950 previously spent on each departing pupil.

In the foregoing example, "fixed" costs plus relatively inflexible "variable" costs amount to $420 per pupil, or 44 percent of total costs per pupil. If enrollment dropped, these costs would have to be spread over fewer pupils, and costs per pupil would rise. We can estimate this rise from the following formula:

$$C_2 = C_1 + (C_1) \left(\frac{E_1-E_2}{E_2}\right) (f + k - kf)$$

where C_1 = Costs per pupil before the demonstration
C_2 = Costs per pupil during the demonstration
f = The fraction of C_1 going to "fixed" costs
k = The fraction of "variable" costs that cannot be saved, given some hypothetical cut in enrollment
E_1 = Enrollment before the demonstration
E_2 = Enrollment during the demonstration

In the Midburg example, $C_1 = 950$; $f = 250/950 = .263$; $k = 170/700 = .243$; $E_1 = 16,920$, and $E_2 = 15,920$. Thus

$$C_2 = 950 + 950 \left(\frac{16,920-15,920}{16,920}\right) (.263 + .243 - (.263)(.243))$$

$$C_2 = 950 + 25$$

$$C_2 = \$975$$

Alternative values can easily be substituted in this same formula to predict per pupil costs under different assumptions about fixed costs, savings in variable costs, and enrollment shifts.

It should be noted that the increase in per pupil costs under a voucher system, while not easily prevented, is not simply a matter of "inefficiency." Many of the increases should yield improvements in the education of the children. If, for example, the number of pupils in a room drops from 35 to 30, this raises costs but it may also benefit the children and should not be defined as "waste".

d. Surplus Funds for Innovation

Part (a) of this discussion showed that a voucher demonstration project would increase the public schools' total revenues unless their enrollment dropped catastrophically. Part (c) showed that their total expenditures would decrease. Consequently, a significant amount of money will be freed up to enable the public schools to innovate.

We can estimate the amount of new money available to the public schools by returning to Midburg. Assume that the voucher system covered 9,170 children who remain in Midburg's elementary schools, and that half these children came from families with below-average family incomes. If these compensatory payments averaged out to only \$100 per disadvantaged child, Midburg's per pupil receipts for elementary schools would increase by \$50. This would just about offset the increase in Midburg's per pupil costs that would result from an enrollment drop of 1,000 pupils. In the more likely event that compensatory payments averaged \$200 or \$300 for children from disadvantaged families, Midburg would end up with a net surplus of \$390,000 to \$845,000.

If Midburg's elementary enrollment fell by more than 1,000 pupils, the financial picture would be slightly less bright, because Midburg's "fixed" costs would have to be spread over fewer students, and would eat up more of Midburg's revenues from compensatory payments. We can summarize the general situation in the following formula:

$$S = C_1 \left[cd - \frac{(E1-E2)}{(E2)} (f + k - kf) \right]$$

where

S = The per pupil "surplus" available after covering all fixed costs

C_1 = Total cost per pupil before the demonstration and (by assumption) the value of the basic voucher

c = Ratio of the average compensatory payment to the basic voucher

d = Percentage of public school pupils receiving compensatory payments

E_1 = Enrollment before the demonstration

E_2 = Enrollment during the demonstration

f = Percentage of total costs that are "fixed"

k = Percentage of "variable" costs that cannot be eliminated, given a specified enrollment drop.

Looking at Midburg's elementary schools, for example, suppose $C_1 = 950$; $c = 0.50$; $d = 300/950 = .316$; $E_1 = 10{,}170$; $E_2 = 9{,}170$; $f = .263$; $k = .243$. Then

$$S = 950 \left[0.151 - \left(\frac{10{,}170-9{,}170}{9{,}170}\right) (.263 + .243 - (.263)(.243)) \right]$$

$$S = \$98$$

This would mean a ten percent increase in Midburg's elementary school budget, even after covering increased fixed and variable costs.

We can simplify and generalize the above formula if we make two assumptions. First let us assume that the typical American school district would not be able to save quite as much money when a pupil withdrew as appeared likely in Midburg, and that half its prior costs per pupil would essentially be fixed. Second, let us assume that compensatory payments are available on a sliding scale to all children who fall below median family income (or test score) in the target area. (This assumption is arbitrary. If compensatory payments were available for a smaller fraction of the population, they could be larger, so the net effect would be the same.) We can now simplify our formula to read:

$$S = \left(\frac{c - p}{2}\right) (C_1)$$

where S = the surplus money available for each elementary pupil remaining in the public system, after covering increased costs

c = the ratio of the average compensatory payment to the basic voucher

C_1 = the basic voucher = cost per pupil before the demonstration

p = the ratio of pupils leaving the public elementary schools to pupils remaining

The amount of money available to the public schools for innovation is thus a function of the average compensatory payment and the withdrawal rate. If, for example, the compensatory payments average 30 percent of the basic voucher while withdrawals average 15 percent of remaining pupils, the public elementary schools will be able to increase their budget by 7.5 percent after covering all fixed costs. (If the public system were able to save more than half the cost of educating a pupil when that pupil withdraws, its budget surplus would be larger.)

C. Schools Enrolling Non-Voucher Students

There will doubtless be private schools, especially schools outside the demonstration area, which are willing to take voucher students but cannot attract enough voucher students to fill their entire building. In many cases, these will be predominantly middle-class schools, anxious to diversify their student population. Some will be expensive private schools, unable to accept more than a certain number of voucher students because the vouchers cover only part of the actual cost to the school of the child's education. Some will be specialized schools which appeal to only a few voucher holding parents. In addition, some neighborhood public schools located outside the demonstration area may want to take some voucher students even though they cannot take many.

Such requests probably ought to be granted, in order to maximize the choices available to individual parents.

Such a policy would in effect allow both public and private schools to operate two institutions under the same roof and even in the same classrooms. One of these institutions would be a "voucher school", whose financial arrangements, admissions procedures, disclosure requirements, and so forth would conform to the ground rules laid down by the EVA. The other institution would be a "non-voucher school", whose finances and admissions policies would not be subject to the EVA's ground rules. The EVA's disclosure requirements would probably have to apply to both the voucher and the non-voucher school.

Such a policy would not involve "exceptions" to the basic ground rules for any particular student. No school would be allowed to cash vouchers for students who also paid tuition, or for students not admitted under the EVA's ground rules. But no school would be denied the right to cash vouchers for one student simply because it collected tuition from another student.

Such a policy would have certain difficulties, since it would invite affluent parents to buy a place in the school of their choice for any child who did not get in under the EVA's ground rules. This possibility will, however, exist no matter what the EVA does. Unless they can take both voucher students and non-voucher students, existing private schools are unlikely to participate at all. Given the brevity and uncertainty of the demonstration, most existing private schools would simply continue to cater to affluent parents who could pay the full cost of their children's education out of their own pocket. Such parents would therefore continue to have a competitive advantage over less affluent parents who could not afford to pay tuition.

At least in a demonstration, then, allowing private schools to admit both tuition-paying and voucher students would broaden the range of opportunities available to non-affluent families without increasing the competitive advantage of the affluent family. This argument would not necessarily hold up in a permanent, state-wide or nation-wide voucher system, but that is not our present concern.

Allowing voucher schools to take non-voucher students would raise several policy questions for the EVA which deserve brief mention.

Suppose that a private school admits 30 first graders on a fee-paying basis, but opens 10 of its places to voucher applicants. If it has 20 applicants with vouchers, should it be required to fill all its 10 voucher places by a lottery among the 20 applicants with vouchers? Or should it be allowed to fill 5 voucher places as it sees fit and required to fill the other 5 by a lottery among the remaining 15 voucher holders? The rationale for allowing a school to pick half its pupils on a non-random basis was to give it some control over its own character. A school which admits more than half its pupils on a fee-paying basis has achieved this. It therefore seems reasonable to require that a school which has already hand-picked half its students must fill all remaining places by lot. This issue should, however, be resolved by the EVA.

Or suppose that a white neighborhood public school outside the target area decided that it had room for 50 outsiders with vouchers. Should this school be required to admit all 50 by lottery, which might result in its getting mostly middle-class children? Or should it be allowed to hand pick 25 of its voucher students, perhaps favoring low-income voucher holders? And if it were allowed to favor low-income voucher holders, should it also be allowed to favor black voucher holders, in order to achieve racial balance?

The EVA's answers to questions of this type should presumably depend on the type of discrimination it expects local schools to exercise. If the EVA expects that schools will discriminate in such a way as to achieve racial and economic balance, then it should allow them maximum discretion. If, as seems more likely, the EVA expects most schools to discriminate so as to remain homogeneous, it should give them as little discretion as possible.

D. Financial Arrangements with Parochial Schools

Appendix A argues that Supreme Court interpretations of the federal Constitution do not, as of December 1970, provide a basis for excluding church-related schools from a voucher demonstration. By the time a demonstration is actually launched, this may no longer be so. Likewise, some state constitutions may be construed as barring the participation of church-related schools. If this happens, the voucher system would simply be restricted to secular schools, both public and private.

If parochial schools *are* included, it may be necessary to place special restrictions on the way in which they spend voucher funds, in order to avoid violating federal (or state) constitutional requirements. At the same time, certain restrictions on parochial school expenditures may themselves violate constitutional prohibitions against excessive entanglement of the state in church affairs. Certain restrictions may also make it much more difficult for any non-public voucher school to maintain educational flexibility and diversity. If an EVA funds parochial schools, it will therefore have to balance two conflicting goals: preventing funds from being improperly expended on religious activities, and keeping parochial (and secular) voucher schools free from excessive state regulation.

Three types of vouchers could be provided for parochial schools: (a) unrestricted vouchers; (b) secular vouchers; or (c) discounted vouchers.

(a) Unrestricted Vouchers

An unrestricted voucher would place no religious restrictions on the use of voucher funds by parochial schools. Children's vouchers would have the same value regardless of what school they attended. Parochial schools would be free to continue religious activities in the schools as long as they provided their students with as good a secular education as did other voucher schools. Achievement tests might be administered to ensure that no parochial school was doing a worse job than the worst public schools, or the state might rely on parents to judge whether a given school was providing their children with a satisfactory education. The unrestricted voucher has the advantage of not requiring the state to police the day to day activities of parochial schools for religious activities. This would save administrative time and expense, and it would also avoid the constitutional problem of the state's becoming excessively entangled in the affairs of the church.

(b) Secular Vouchers

A secular voucher system would require that voucher funds be spent only on secular activities. Children's vouchers would have the same maximum value, regardless of what school they attended, so long as this requirement was met. Voucher schools might be required to conduct secular and religious activities at different times, and perhaps in different places. They would then be required to demonstrate that voucher funds were expended only on secular activities. The state would make sure the line between the secular and the sectarian was maintained by auditing all expenditures, and perhaps also be periodically inspecting classes, textbooks, and the like. Any funds spent for religious purposes would have to be raised from private sources. This approach is similar to the purchase of services approach, although it could be administered in a less entangling way if the state relied on normal auditing procedures to check where the money was spent, instead of establishing restrictions on course content which theoretically require supervision of church schools' day-to-day activities.

(c) Discounted Vouchers

A "discounted" voucher would require the EVA to reduce the redemption value of vouchers cashed by parochial schools in proportion to the amount of time devoted to religious activities during the school week. The EVA would make an across the board estimate for all church schools. Thus, if it could be shown that church-related schools on the average spent less time providing a secular education for their students, all such schools' vouchers might be discounted by an appropriate amount. This would provide a way to avoid the necessity of policing each and every class for religious content, while also avoiding a general subsidy for religious institutions.

Both political and legal criteria appear relevant in deciding between these three alternatives. Politically, those who urge the inclusion of church-related schools in a voucher system have found it convenient to promise that government money would be spent only on secular instruction, not on religious instruction. Unfortunately, this promise could only be made good by establishing elaborate policing machinery to ensure that church-related schools actually made a clear distinction between secular and religious instruction, and that they allocated every acitivity to the correct category. Since church-related schools have not historically made such a distinction, and since there are no well-developed or widely understood criteria for allocating activities to one category rather than the other, attempts to establish the necessary enforcement machinery would probably breed bitter controversy. The short-term political advantage of promising that subsidies to church-related shools will not be used to subsidize religious instruction must therefore be weighed against the long-term political disadvantages of having the state intimately involved in the internal management of church-related institutions.

Were the choice among alternative voucher systems for church-related schools to be made on exclusively political bases, we have little doubt that short-run considerations would prove decisive. Legal considerations are also important, however. Furthermore, recent Supreme Court decisions suggest that the Court is becoming less concerned with the question of whether a program aids churches in some way, and more concerned with the question of whether it entangles the government in the internal affairs of a church.

In the past, constitutional lawyers have argued that the First Amendment prohibits legislation which "advances" religion, especially if this is its primary intent. This standard implied that a voucher system (or a purchase of services system) which restricted the use of public funds to secular instruction would have a better chance of being upheld than a voucher system which placed no restrictions on the use of public funds. But in Walz v. Tax Commission (1970) Chief Justice Burger explicitly rejected the argument that legislation is unconstitutional if it merely "advances" religion. The plaintiffs had argued that the exemption of church property from taxation was unconstitutional because it advanced religion. The Court rejected this argument, and held tax exemptions constitutional. It did so on the grounds that while exemptions might "advance" religion, they did not help "establish" it. This same line of reasoning seems directly applicable to vouchers. There can be no doubt that an unrestricted voucher, like tax exemptions,would "advance" religion. But an unrestricted voucher may not "establish" religion so long as parents have a free choice about whether they send their children to church-related or secular schools.

Furthermore, the Chief Justice explicitly stated in Walz that one reason for holding tax exemptions constitutional was that this appeared to be the best way to avoid entanglement of the state in the affairs of churches. This emphasis on the dangers of excessive entanglement suggests that an unrestricted voucher, which involves no state policing of church-related schools, would have a better chance of being upheld than a voucher system which tried to create such a policing system.

Nobody knows, of course, what the Supreme Court may hold at some future date.[1] The above arguments are conjectural, and they may be wrong. Nonetheless, they suggest that both long-term political peace and short-term chances of winning Supreme Court approval would probably be maximized by an unrestricted voucher for church-related schools. Failing that, there is much to be said for excluding church-related schools entirely.

(d) Historical-Political Issues

Assuming that an EVA decides to cash vouchers for church-related schools, several economic problems are likely to arise during a demonstration project of limited duration (e.g., five to eight years). Many church-related schools, especially Catholic schools, now spend appreciably less money per pupil than nearby public schools. This situation has been changing quite rapidly, however, for several reasons. First, Catholic schools have been trying to make their class sizes comparable to the public schools, in order to hold their clientele. Since the supply of nuns available to teach in Catholic schools has been diminishing relative to enrollment, there has been a sharp increase in the proportion of lay teachers. To attract these lay teachers, parochial schools have had to bring salaries closer to public school levels. At the same time, teaching orders have increasingly demanded that parish schools compensate the order for the services of its teaching sisters at a rate which reflects the real costs of training, retirement, maintenance, overhead, and the like.

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[1] Given the likelihood of extensive litigation, the budget for a demonstration should include funds for the EVA's attorneys and other legal costs.

The net result of these trends is that Catholic school costs increasingly approximate those in public schools.

Under these circumstances it seems reasonable to assume that if a voucher system were established, parochial school costs would quickly reach the maximum level permitted under the system, i.e., the level in the existing public system. This could pose two kinds of problems: political problems while phasing in, and economic problems while phasing out.

Quite aside from constitutional arguments, many people oppose the very existence of Catholic schools. If money is spent in such schools, these people will want to keep expenditures as low as possible. They will oppose letting parochial schools raise their budgets to the public school level, since this would allow the parochial schools to spend substantially more than they have in the recent past. Some will view these expenditures as "windfall profits" to the Catholic Church, even if the money is actually spent on secular education. In order to meet these objections, there may be pressure on the EVA to restrict the redemption value of a school's vouchers to what that school spent before the experiment began, perhaps allowing some specified annual increase above this initial level. Logically, this kind of procedure makes little sense, since it penalizes a school for having been in existence before the start of the experiment. Indeed, one can imagine schools deliberately declaring themselves bankrupt, selling their building to a new corporation, and then having this corporation rehire most of the old staff - all in order to qualify for a full voucher. This seems silly. Nonetheless, it may be politically necessary.

A related problem is that if church-related schools become accustomed to operating at the same level as public schools, and if parents become accustomed to paying no tuition, it will be almost impossible for these schools to go back to their old arrangements after the demonstration is over. At the end of the demonstration, such schools will either have to find other sources of public money or will have to become private schools of a rather different kind than they were before the demonstration began. It is true, of course, that many parochial schools face this choice even if no voucher demonstration takes place. Nonetheless, a voucher demonstration could hasten the inevitable in some cases, even though it would postpone it in others.

While there is no simply way to resolve these problems, there is one way to cushion their impact. This would be for the Catholic school system to set aside each year an amount roughly comparable to what it had "saved" as a result of the demonstration. This money would then be available to maintain the schools in question if no other public funds became available when OEO funding was withdrawn. Such an arrangement could probably not be established on a legally binding basis without violating the First Amendment. But if a Catholic school system made a commitment of this kind, parents with children in the schools would doubtless exert great pressure to see that it was enforced. While an arrangement of this kind would not provide a permanent solution, it might solve some of the political problems associated with full funding of parochial schools, since it would reduce the appearance of "windfall profits." It might also cushion the possible economic impact on the public system of closing the parochial schools at the end of the demonstration.

E. The Structure of an Educational Voucher Agency

Section I recommends that an Educational Voucher Agency (EVA) be established to administer a voucher demonstration project. This would require the active cooperation of the local board of education (LEA)[1] and the approval of the state where the demonstration was to take place. If such support were forthcoming, state and local authorities would have to establish an appropriate political mechanism for controlling the EVA.

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[1] LEA stands for "Local Education Agency," the legal term for a local board of education or its equivalent.

At least three plausible alternatives are available to state and local authorities:

(1) The LEA could simply designate itself as the EVA, and could establish a new sub-division of the existing public school administration to handle the new activities of the LEA. The new sub-division would presumably be staffed largely by people drawn from the existing school administration, though some new employees would also doubtless be added.

(2) The LEA could appoint a separate board to control the demonstration, and could give this board the power to organize and staff the EVA. An EVA of this kind would be legally the creature of the LEA, in the sense that the LEA could reorganize it, terminate its existence, replace its board, and so forth. But on a day-to-day basis it could have considerable autonomy, and it might be able to develop some political independence as well.

(3) The LEA could join with other public agencies in creating an entirely independent EVA, or it could acquiesce in some existing agency's being designated as the EVA for the duration of the demonstration. The board of such an independent EVA would presumably include representatives of the LEA, public and private school staffs, parents, and other key groups.

These three alternatives obviously fall on a continuum stretching from complete integration of the LEA and the EVA to complete independence. In any specific demonstration site, however, only two of the three alternatives are likely to make much sense.

If the demonstration site covers only part of a school district, there will be a strong argument for establishing some kind of board which can represent the interests of parents and educators in the target area. Establishing an EVA and making a voucher demonstration work will be time consuming and potentially controversial. A school board which undertook this responsibility without some local buffer would be likely to end up spending a large portion of its time on the problems of this one experiment. If the board were also responsible for large numbers of schools outside the demonstration area, it would be unlikely to meet either set of responsibilities well. On both administrative and political grounds it ought, therefore, to choose either alternative (2), which would create an EVA for the target area but would leave its decisions subject to ultimate review and rejection by the LEA, or alternative (3), which would create an autonomous EVA for the target area.

If the demonstration covers an entire school district, alternative (2) will make little sense. There is no reason for an LEA to create a separate district-wide EVA if the LEA is then going to review all the EVA's decisions. If the demonstration covers the entire district, the LEA should choose either alternative (1), in which the LEA becomes the EVA,or alternative (3), in which the LEA concentrates on managing the public schools, while an independent EVA assumes responsibility for financing and overall regulation of both public and private voucher schools.

In any given situation, then, there is a choice between an EVA identical with or answerable to the LEA and an independent EVA. We will label the first alternative an "LEA-EVA," and the second alternative an "independent EVA." Obviously these labels should not be taken too literally. No EVA can be too independent of the LEA if the demonstration is to continue. Nor is this likely if several LEA board members also serve on the EVA board, as they probably should. Conversely, an EVA which is nominally controlled by the LEA may in fact have considerable independence, especially if it has its own local constituency.

The relative merits of the LEA-EVA and the independent EVA depend largely on which of the EVA's functions are judged to be most important. We will consider the relative effectiveness of these alternatives in performing the following functions:

(a) General administration (e.g., identifying children eligible to cash vouchers, distributing vouchers to their parents, collecting federal, state and local funds with which to cash vouchers, disbursing funds to schools, perhaps operating a computerized clearinghouse for schools, perhaps providing a centrally managed school transportation system, and so forth);

(b) Establishing and enforcing regulations regarding both public and private schools' eligibility to cash vouchers;

(c) Collecting and disseminating information about both public and private voucher schools to parents;

(d) Perhaps providing technical and financial assistance to groups starting new voucher schools.

(a) General Administration

There is no clear reason for supposing that an independent EVA would be either better or worse at general administration than an LEA-EVA. The staff of an LEA-EVA might well feel more sympathetic to public than to non-public schools. This might introduce some biases in handling relatively routine matters (e.g., establishing school bus schedules, processing applications to schools). This argues for an independent EVA. On the other hand, an independent EVA might have an opposite bias. More important, an independent EVA would be a new agency and might have difficulty hiring and training staff to run a complex operation on short notice. An LEA-EVA might, however, have similar difficulties if the LEA had rigid civil service requirements or a bad local reputation as an employer.

Determining schools' eligibility for compensatory payments will be a substantial administrative problem, whether the criterion is family income, test scores, or whatever. Minority parents have the most substantial interest in seeing this eligibility check done fairly. Many of these parents are deeply suspicious of existing boards of education. If eligibility for compensatory payments is going to involve direct EVA-to-parent contact, it might be better to have an EVA that was not too identified with the LEA.

(b) Establishing and Enforcing School Eligibility Requirements

Although conditions are certain to vary from one place to another, an LEA-EVA seems likely to establish more eligibility requirements for cashing vouchers than would an independent EVA. An

LEA-EVA's staff might be somewhat suspicious of new private schools which claim they can do a better job than their public competitors. Such suspicions could lead to proposals for a wide variety of regulations designed to prevent "hucksterism" - regulations which others will view as preventing "innovation." An independent EVA which had been established to foster diversity and choice in education would probably recruit a staff that was somewhat more permissive, both politically and pedagogically. The character of the EVA's staff will of course depend largely on the character of its board. A newly created EVA is perhaps likely to represent both ethnic and educational minorities better than the average school board now does. But then a school board which agrees to participate in a voucher demonstration is not likely to be average. An ad hoc judgment on this issue, based on local circumstances, therefore seems to be required.

There is one area, namely protection of minority rights, where an independent EVA might engage in more stringent regulation than an LEA-EVA. One of the main innovations proposed in Section I is opening all voucher schools equally to all applicants, regardless of whether they live nearby. This means opening large numbers of hitherto white schools to black and brown applicants from outside the neighborhood. Most of these schools will be public, though some may be parochial. If a public school receives a lot of "outside" applications, some children who live nearby may have to go elsewhere. Since privately managed schools have less of a tradition of favoring applicants from their neighborhood, they may accept provisions of this kind more readily than the neighborhood public school.

Enforcing open enrollment provisions could turn out to be a major problem. Many boards of education already have analogous (though less stringent) regulations regarding the right of minority group students to transfer. Yet these boards have not usually been very diligent in enforcing such regulations. Many have let their staffs discourage such transfers informally. It seems quite possible that this wouuld continue in a voucher system regulated by an LEA-EVA. A system regulated by an independent EVA might be more vigorous, partly because its board would be more likely to include civil rights leaders who would be ready to publicize abuses. (This might also be true in an EVA appointed by the board to handle a demonstration in one part of the LEA's overall jurisdiction.)

(c) Information Collection and Dissemination

It seems reasonable to anticipate that an LEA-EVA will be more vigorous in establishing and enforcing requirements for voucher schools' participation in a demonstration because most public schools already meet most of the eligibility requirements an EVA might establish (except for non-discriminatory admission of non-neighborhood residents). Following this same logic, it seems likely that an independent EVA would be more vigorous in collecting and disseminating information about schools. Very few public schools collect, much less disseminate, enough information for parents to make intelligent comparisons among schools. Admittedly, private schools have no better record in this regard. Still, an LEA-EVA is likely to be cautious in requiring detailed information from public schools, since this might prove embarrassing to the LEA. An independent EVA is more likely to view such embarrassment with equanimity.

(d) Technical Assistance to New Schools

If the EVA assumes some responsibility for helping private groups launch new enterprises, it seems more likely to perform this function energetically if it is relatively independent of the public system. Public school officials have not usually been very helpful to groups of teachers or parents who were dissatisfied with the public schools and wanted to create an alternative. An LEA-EVA might even conclude that helping new schools was an "inappropriate" function for a public agency. An independent EVA might also reach this conclusion, but it seems less likely. If the EVA does reach this conclusion, some other source of money will be needed to provide "risk capital" for getting new schools going. Otherwise, new schools serving the poor are unlikely to get off the ground.

In summary, an independent EVA is likely to perform better in guaranteeing minority rights, determining eligibility for compensatory payments, helping develop new schools, and collecting information for parents. Either type EVA could perform basic administrative functions. An LEA-EVA would probably propose more educational standards for cashing vouchers. But this analysis is based upon generalizations about public school administrations across the country. In any particular community, application of these same criteria might lead to a different conclusion.

APPENDIX A

CHURCH-STATE ISSUES

The First Amendment of the United States Constitution provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This appendix will consider whether these requirements preclude the inclusion of parochial schools in a voucher system such as that proposed in Section I.

There is no longer any question that religious schools serve important and allowable public functions.[1] The issue has been to what extent the government may support or facilitate the public and secular activities of otherwise religious bodies without violating the First Amendment. Five major Supreme Court cases have dealt with this issue, and each of them has found the support constitutional. Bradfield v. Roberts[2] (construction grants to a hospital controlled and staffed by members of the Catholic Church); Quick Bear v. Leupp[3] (payment of cost of salaries and maintenance of a Catholic school on an Indian Reservation); Everson v. Board of Education[4] (state provision of free transportation to students in religious schools); Allen v. Board of Education[5] (state provision of free textbooks to students in religious schools); and Walz v. Tax Commission[6] (exempting churches from state ad valorem property taxes). Though the specific facts and reasoning varied in each case, the common concern was a reconciliation of the prohibition against a governmental establishment of religion with the government's legitimate interest in the public welfare.

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[1] "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." Everson v. Board of Education, 330 U.S. 1, 7 (1947).

[2] 175 U.S. 291 (1899).

[3] 210 U.S. 50 (1905).

[4] 330 U.S. 1 (1947).

[5] 392 U.S. 236 (1968).

Two cases now before the Supreme Court should further clarify the constitutionality of public aid to non-public (including parochial) schools: Lemon v. Kurtzman,[7] in which a three judge federal court of appeals upheld the Pennsylvania "purchase of secular services" plan for aid to non-public schools; and DiCenso v. Robinson[8], in which a three judge federal court struck down the Rhode Island "purchase of services" plan. If purchase of services programs are upheld by the Court, then the same approach could be adopted for including parochial schools in a voucher plan. But even if purchase of services is held unconstitutional, parochial school participation in certain voucher plans may nonetheless be constitutional, because of two fundamental ways in which they differ from the purchase of services approach. First, parents, not the state, decide which schools will receive their child's share of public education funds. Second, voucher systems can be arranged so that the state does not police the internal affairs of church schools to determine whether expenditures are secular or not. This means that entanglement of church and state can be more easily avoided than under a purchase of services arrangement.

In legal terms, there are two theories under which parochial schools may constitutionally participate in the proposed voucher plan.

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[6] 90 S. Ct. 1409 (1970).

[7] 310 F. Supp. 35 (E.D. Pa. 1969), prob. juris. noted, 90 S. Ct. 1354 (1970).

[8] 316 F. Supp. 112 (D.R.I. 1970), prob. juris. noted, 39 U.S.L.W. 3194, Nov. 10, 1970.

The first theory holds that the essential feature of the voucher program - its reliance on individual freedom of choice - makes it constitutionally immune. The premise of this theory is that the voucher program puts effective control of the educational funds in private hands. Since private acts which benefit religion are constitutionally protected, it is arguable that a voucher program is constitutional even if benefits accrue to the religious schools receiving the vouchers.

An alternative theory holds that the program envisioned by this report does not confer unconstitutional benefits on religious institutions. The vouchers simply reimburse religious instituutions for the value of the secular education they provide. Allen and other cases suggest that this is a constitutional expenditure. We will examine these two theories in order.

1. The "Private Choice" Theory

The First Amendment begins "Congress shall make no law ..." and the Fourteenth decrees "No state shall make or enforce any law...." The Constitution proscribes only government support of religion; non-government support is not barred. This is the principle upon which Quick Bear v. Leupp was decided. The plaintiff, a Sioux Indian, sued the Commissioner of Indian Affairs to enjoin execution of a contract between the Commissioner and the Bureau of Catholic Indian Missions. The contract provided the Bureau with funds to pay teachers and maintain buildings in a Catholic school on the Sioux reservation. The promise of funds had been incorporated in a treaty requiring the federal government to provide schools and teachers for each group of 300 Indians who wished to be educated. The Court upheld the expenditure and contract, noting that although the funds were appropriated each year by Congress, they were, in effect, not spent by the federal government but only administered by it. The Indians had an absolute right to the funds, and the government had no choice but to allocate them once the Indians determined their disposition by choosing the schools they wished to attend.

Quick Bear indicates that aid to a religious school may be held constitutional if two conditions are met: entitlement to the money and private choice as to its ultimate recipient. Each of these requirements is met in a voucher program.

a. Entitlement

The voucher program envisioned in this proposal would give every school-aged child a legal right to use vouchers at eligible schools. This is the requisite entitlement. That the rights in Quick Bear were based on a treaty rather than statute seems irrelevant, since the Supreme Court made no mention of the unique status of treaties. The decision turned on the fact of entitlement, not its source.

Most states have long had constitutional provisions binding them to provide education for the young. In states where no such provision exists, statutory entitlements could serve as well. Thus the Supreme Court of Pennsylvania, in Schade v. Allegheny County Institution District,[9] upheld the allocation of funds to sectarian institutions which cared for neglected or dependent children. The Court held that payment of these public funds was not a governmental "appropriation."

> The cost of the maintenance of neglected children either by the State or the County is neither a charity nor a benevolence, but a governmental duty.[10]

Similarly, a voucher program intended to satisfy this duty need not be considered an unconstitutional "appropriation" to a religious institution.

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[9] 386 Pa. 507 (1956).

[10] Id. at 512.

The students would have a statutory right to the educational funds, a right in most cases buttressed by the specific provisions of the state constitutions.

b. Free Choice of Recipient

Although the Supreme Court in Quick Bear did not dwell on the point, the constitutional immunity of the contract between the government and the church was based at least partially on the fact that private individuals had selected the church-run school. If the government transfers funds to an agency or person having complete or near-complete control over their use, it is arguable that the government has not extended benefits to any subsequent religious recipient; the private payer has. Both Everson and Allen are explainable on these grounds. The Court noted in each case that any benefit accruing to religious schools (e.g., increased enrollment) was an incidental by-product of conferring the primary benefit on the school children. The state action was only the provision of free bussing and textbooks to the children; benefits to sectarian schools occurred only as a result of private choice.

The primary consideration here seems to be the breadth of free choice involved. The greater the intermediate individual discretion, the greater the likelihood of avoiding an unconstitutional connection between the government and the private institution. In Everson and Allen the students received free transportation and books regardless of which school they attended (so long as it was accredited).

If the government gave parents money rather than vouchers, the connection between the government and religious institutions would be extremely attenuated. In order to restrict the money to educational use, vouchers are probably necessary. This use of vouchers rather than cash need not increase government involvement, however. Voucher funds could be maintained in special separate accounts, for example, thereby closely approximating the administrative procedures upheld in Quick Bear. The only "connection" in such a case would be that the government would cash the vouuchers, primarily as an administrative convenience. No government agency, either legislative or executive, would then have any discretion as to whether funds flowed to a religious or a secular school.

Many analogies readily come to mind. It is presumably constitutional to support the religious education of children with money provided to parents by welfare agencies. Likewise, the faithful parishioner does not violate the Constitution when his social security payments find their way to the collection plate on the Sabbath. The position of vouchers on the continuum between "public" and "private" funds appears much closer to these examples than it does to more direct aid, such as federal construction grants, yet even these have recently been upheld.[11]

The closest existing analogy to vouchers, however, is probably the present income tax deduction for contributions to charities. Contributions to religious groups are eligible for deduction on the same basis as contributions to secular non-profit groups. Nor are such deductions conditioned on the church's using the money for secular activities; the church can pay its clergymen or buy a hymnal with the funds if it so desires. The deductions appear to be constitutional for two reasons. First, the benefit is not exclusively available to religious charities. Second, the religious group benefits from the deduction only through the voluntary decision of the taxpayer to channel his contributions to that group.

The analogy between vouchers and tax deductions becomes clearer when it is realized that the objectives of a voucher system could also be achieved by an appropriate income tax credit, or negative income tax payment, which could be used to cover educational expenses. These approaches have a variety of obvious administrative drawbacks, however. A voucher system appears to be a more equitable and efficient method of achieving the same objective. It may therefore be equally immune to constitutional challenge.

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[11] See Tilton v. Finch, Civ. No. 12,767 (D. Conn. 1970).

Nor need the analogy with tax deductions be taken to imply that a voucher system is only constitutional if the state places no restrictions on the kinds of schools that can cash vouchers. As with tax deductions, the state can and does set certain requirements for institutions that wish to become eligible. Similarly, it could set such requirements for schools that wished to cash vouchers brought to them by parents. But these regulations would presumably apply to all schools, whether secular or religious. Such regulations would not mean that the schools were arms of the state, any more than authorizing a tax exempt status for charities makes them arms of the state.

The G.I. Bill[12] also supports this view. Under the bill, thousands of veterans used government funds not only to attend church related schools and colleges, but for seminary training. The schools and colleges were, however, required to meet certain eligibility requirements.

On the other hand, Appendix B argues that with respect to racial segregation, voucher schools are arms of the state, and are forbidden to discriminate. It might be argued by analogy that they must also be forbidden from conducting prayers or other religious activities unappropriate to a public school. The analogy is not perfect, however.

The nature of the government's constitutional interest in racial discrimination is substantially different from its interest in religion. The prohibition against discrimination is clear, and is not counterbalanced by any equally strong opposing interest. The government therefore has an obligation to oppose invidious segregation if the state is involved to any degree whatsoever. In religious matters, the countervailing pressures of the Establishment and Free

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[12] 72 Stat. 1177 (1958), 38 U.S.C. 1620.

Exercise clauses require a delicate balancing of interests.[13] The resolution of these countervailing First Amendment interests by the political and administrative arms of government is therefore likely to be given great weight by the courts. While even state indifference in racial matters may itself be forbidden,[14] this is not the case in religious matters. Rather, neutrality is required. Thus the outcome and reasoning of voucher cases centering on racial issues have little if any bearing on religious ones.

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[13] *Compare* Cooper v. Aaron, 358 U.S. 1 (1958) (Equal Protection):

> The constitutional rights of children not to be discriminated against in school admissions on grounds of race or color declared by this court in the *Brown* case can neither be nullified openly and directly by state legislatures or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingenuously or ingeniously."
>
> [S]tate support of segregated schools through any arrangement, management, funds or property cannot be squared with the Fourteenth Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. *Id.* at 17, 19.

with Zorach v. Clauson, 343 U.S. 306 (1952) (Establishment and Free Exercise):

> To hold that [the state] may not [adjust public activities to sectarian needs] would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for the government to be hostile to religion and to throw its weight against the efforts to religion and to throw its weight against the efforts to widen the effective scope of religious influence. *Id.* at 312.

The Solicitor General in argument before the Supreme Court stated that *Everson*, *Zorach*, and the *Sunday Closing Law Cases* "contemplate an accommodation between the two freedom of religion clauses, so that a degree of establishment is allowable to avoid hampering free exercise." 38 U.S.L.W. 3273 (Jan. 27, 1970). He noted the special statutory provisions indicative of the reconciliation of these two clauses, e.g., tax exemptions for churches and ministers, exemption from the draft, etc.

The argument that vouchers are acceptable because they do not in themselves aid churches, but only enable private individuals to do so if they wish, is nonetheless unlikely to persuade the courts unless freedom of choice exists in fact as well as in theory. This means a student must always have access to a non-religious institution. This will normally be the case in any voucher system, because maintenance of public schools is required by most state constitutions. If, however, a student who did not want to attend a religious school were forced to do so, whether because the public schools lacked space or for any other reason, successful Free Exercise and possibly Establishment challenges could probably be mounted.

Assuming real freedom of choice, however, it seems quite possible that federal courts would hold a voucher system consistent with the First Amendment on the grounds that schools are selected by private individuals. Quick Bear v. Leupp seems directly on point and controlling.

2. The "No Proscribed Benefit" Theory

Even if the Supreme Court were to hold that the intervention of the freely choosing parent was not sufficient to make vouchers immune to the restrictions of the First Amendment, it might nonetheless find the inclusion of parochial schools in a voucher system constitutional if the voucher system were designed only to compensate church schools for the value of the secular instruction they provide to children whose parents select the school. Even if the courts view the government rather than the parent as paying for these costs, the government's action may be consistent with the First Amendment. Police and fire protection, transportation of pupils, free textbooks for pupils, school lunches,[15] and health services have all been noted by the Court as conferring some aid on religious institutions.[16] Thus some standard is required to distinguish between aid which is allowable under the Establishment clause and that which is proscribed by it.

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[14] See Reitman v. Mulkey, 387 U.S. 369 (1967).

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[15] 60 Stat. 233 (1946) as amended 42 U.S.C. 1759.

[16] See Everson v. Bd. of Educ., supra note 4, Allen v. Bd. of Educ. supra note 5, Walz v. Tax Commission, supra note 6.

Emerson, Haber, and Dorsen have found that: "Programs of federal aid to religious institutions prior to 1965 included aid to private denominational hospitals under the Hospital Survey and Construction Act, 60 Stat. 1041 (1946) as amended, 42 U.S.C. 291; see Drinan, Religion, the Courts, and Public Policy 37 (1963); lunches to parochial school children under the National School Lunch Act, 60 Stat. 233 (1946) as amended, 42 U.S.C. 1759; payment for the education of Supreme Court pages in private schools, 60 Stat. 839 (1946), 2 U.S.C. 88a; grants and loans for tuition and educational materials to private schools, regardless of their religious character provided for Korean War Veterans, 72 Stat. 1177 (1958), 38 U.S.C. 1620, and in connection with the National Defense Education program, 72 Stat. 1590 (1958), as amended 20 U.S.C. 445; and loans and grants for construction by private colleges and universities, 64 Stat. 78 (1950), as amended, 12 U.S.C. 1749a; 77 Stat. 366 (1963), 20 U.S.C. 714. For a more comprehensive list of federal projects which in part bestow financial aid on religious institutions, see Hearings before the Subcommittee of the Senate Committee on Labor and Public Welfare, on S. 370, 89th Cong., 1st Sess. 146-157 (1965)...." Political and Civil Rights in the United States, Vol. 1, 1967.

One test by which proposed government action may be appraised was set forth in *Allen v. Board of Education*:

> The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the *Establishment Clause there must be a secular legislative purpose and primary effect that neither advances nor inhibits religion*. *Abington v. Schempp*, 374 U.S. 203, 222 (1963). (emphasis added)[17]

It is clear that a voucher program aimed at improving the quality of the secular education available in non-public as well as public schools meets the "purpose" test of *Allen*.[18] *Allen* itself confirmed that independent and sectarian schools may be included in a program designed to achieve that public purpose.

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[17] 392 U.S. at 243. The *Walz* decision appears to have modified this test. In *Walz*, Chief Justice Burger wrote for the Court that "each value judgment under the Religion Clauses must ... turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." 90 S. Ct. at 1411. Thus legislation which merely "advances" religion is no longer necessarily barred unless it actually helps to "establish" it. The Court in *Walz* confirmed that it was moving toward a more pragmatic standard by observing that any activity which "realistically 'establishes' a church" could be stopped "while this Court sits." 90 S. Ct. at 1416.

[18] *Supra*, note 1.

The "effect" standard is more difficult to interpret. The Supreme Court has struck down education laws on the grounds that they had a primarily religious "effect" in only three cases.[19] The practices struck down all involved religious exercises in public schools, and were also examples of state programs whose purpose was to advance religion. Although none of these three cases involved government appropriations, an important insight into the "effect" test can be gained from them. In each, the government was directly and immediately involved in the religious exercises. They were often conducted by public school teachers and on state property. By contrast, in the five cases in which appropriations to nonpublic schools were upheld, this sort of direct and immediate involvement was absent. Either a secular body was in control (Bradfield) or individuals were exposed to religious schools only by their own free choice (Quick Bear, Everson, Allen and Walz). The proposed voucher program is clearly more analogous to the latter cases.

Allen does not clarify, however, whether aid must be confined to strictly secular activities, or whether some religious activity may be enhanced with the aided secular activity as long as it does not impair the quality of the secular education provided. If aid must be restricted to secular activities, the state may have to police each and every aided class in nonpublic schools, in order to make sure they are not "tainted" with religion. But such enforcement has itself been held to violate the Establishment Clause[20] on the grounds that the state is excessively entangled in the affairs of the church. This issue is now before the Supreme Court.[21] If the lower court interpretations of Walz prove to be correct, the states will be forbidden to police nonpublic schools for religious permeation. A voucher program which involved no such policing could, however, include parochial schools without violating Walz. Such a program might be held constitutional if the value of the secular education given to children could be shown to equal the value of the voucher.

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[19] See Abington v. Schempp, 374 U.S. 203 (1963); Engle v. Vitale, 370 U.S. 421 (1962); and Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948).

[20] See DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970); Johnson v. Sanders, Civ. No. 13432 (D. Conn., Oct. 15, 1970).

[21] DiCenso v. Robinson, note 20, supra, prob. juris. noted, 39 U.S.L.W. 3194, Nov. 10, 1970.

a. The "Secular Value" Theory

This theory is premised on the notion that as long as schools must provide a specific secular service for which the state has a legitimate need in return for voucher funds, they are not being unconstitutionally supported by the state. As long as the state has a reasonable standard for determining the secular value of the total service provided in exchange for voucher funds, it need not police classes from day to day. Year end academic achievement tests in secular subjects might serve this purpose. The state could, for example, simply say that any private school whose reading and math scores were equal to those in the worst public school was providing a secular service whose value was equal to what the worst public school spent. Such evaluation measures should be suitably controlled for pupil characteristics when the adequacy of the secular education provided in a given school was being determined. But this should involve far less church-state entanglement than daily allocation of activities to the "secular" or "sectarian" category.

If schools operated for profit are included in the voucher program, the arrangements with parochial schools could be very straight forward. Any difference between the actual "cost" of the secular education provided in a church school and the value of the vouchers it cashed would be "profit." Since schools would be free to use "profits" as they saw fit, church schools could presumably use them for religious activities.[22]

This logic is not necessarily inapplicable even if profit-making schools are forbidden to cash vouchers. If the state provides students with vouchers so that they can acquire certain specified secular skills like reading and arithmetic, and if it agrees to cash vouchers for any school whose average performance on standardized tests in these subjects reaches the level of the lowest public school, then the state may reasonably be said to receive a service of the required value in return for its expenditure. If a non-profit secular school can bring its children to the required level of competence, it is presumably free to spend its money in any way that it judges consistent with its overall educational purpose. These expenditures may or may not have a direct relationship to the secular instruction of the pupils. They may involve public lectures for people in the neighborhood, clambakes for families with children in the school, athletic exercises for the children, concerts, or a dozen other things. The school may or may not believe that these activities help create an atmosphere in which the children learn more, and this may or may not actually be the case. The state need not concern itself with these questions. It is only concerned with whether the school actually teaches the children the secular skills and information the state judges useful to all young people. If it does this, it is eligible to cash its vouchers for their full face value, i.e., what the public schools spend to achieve the same result.

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[22] Cf. Choper, The Establishment Clause and Aid to Parochial Schools, 56 Calif.L.Rev. 260 (1968) who argues "if any organization - profit or nonprofit, religious or sectarian - provides a secular service to government at the "going rate," and is able to profit thereby because of low labor costs, efficiencies, or any reason, the Constitution should not be held to prohibit it. In fact, for the government to refuse to deal on equal terms with an organization providing public services because that organization is religiously affiliated might even be seen as a violation of the free exercise clause." Id. at 288-89.

If this argument applies to schools which are not affiliated with churches, it would also seem to apply to private schools that are so affiliated. As long as church schools bring their students to the required level of competence in secular subjects, the state has no necessary interest in how they spend the money they receive for performing this service. They may spend some of their money on religious activities, and they may teach secular subjects in a way which also instills religious values. This is not the state's concern. It makes no difference, according to this theory, whether a child is taught to read with the Bible or with Dick and Jane, so long as the end result is that he can read whatever secular material the state selects for inclusion in its testing program.

In order to justify a voucher system of this kind, however, a second requirement must also be met. This is that the state maintain a properly "neutral" role between secular and sectarian interests. As long as parents have an opportunity to fulfill the compulsory school attendance laws at a secular public school, they will enroll their children in religious schools only if they want a religious atmosphere. Far from being deprived of free exercise rights, therefore, these parents are being given a chance to exercise them.

Past Supreme Court decisions rejecting prayers and bible readings all dealt with public schools, which must be secular because children of many faiths are required by law to attend them. There is no reason to suppose that the Court's holding with respect to public schools also applies to non-public ones simply because they receive public money. In fact, the Supreme Court banned prayers in public schools partly because parents could still choose a religious education for their children. In the words of Mr. Justice Brennan:

> Attendance at the public schools has never been compulsory. Parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. In my judgment, the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative - either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures.[23]

In the absence of public subsidy, poor families cannot exercise this theoretical freedom of choice. A voucher plan does nothing more than extend to all families the same opportunity to make a religious choice which was previously available only to the relatively affluent.

But even if it is constitutional to allow parents to send their children to publicly subsidized parochial schools, does it not violate the constitutional rights of other taxpayers to make them bear the cost of that subsidy? This objection appears unreasonable for two reasons. First, as long as the state spends no more to educate a child at the parochial school than it would to educate the child in a public school, and as long as it receives secular services of equal value in either case, the taxpayer is not shouldering a religious burden. Without public aid, most children in parochial schools will soon seek admittance to the public system. Present aid, therefore, is an obligation taxpayers would eventually bear. Secondly, even if aid to certain church schools offends the conscientious principles of taxpayers who belong to other denominations or to none, that infringement of their liberty may be less than the infringement on the liberty of the devout families caused by witholding aid and forcing them to use secular schools. The conflicting interests require balancing, as in other difficult constitutional areas such as free speech. The balance may be tipped in favor of aid if an important secular purpose, such as raising the quality of secular education in all schools, is also served by the aid.

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[23] 374 U.S. 203, 242 (1963) (concurring opinion).

b. The Secular Cost Theory

If any of the attempts made in recent "purchase of secular services" legislation to restrict public funds to strictly secular activities are upheld by the Supreme Court, then the same procedures can be adopted for vouchers cashed by parochial schools. If such arrangements are accepted, it would be possible to limit the value of vouchers to the actual cost of the secular services provided by a church school, instead of the putative market value of these services. This approach is popular with many laymen because it enables politicians to say that "no public money is being spent for any religious activity." The difficulty is that such a restriction must be policed, and that any effective policing scheme seems likely to violate the prohibition against entanglement recently enunciated in Walz.

There are two kinds of vouchers which meet the general requirement that state expenditures for secular services not exceed their actual cost. These are (1) "reduced cost" vouchers for which the state deducts an appropriate amount for the approximate time spent on formal religious activities; and (2) "actual cost" vouchers for which religious institutions must establish the actual per pupil cost of each secular activity.

(1) "Reduced Cost" Vouchers

Under this system religious schools would be limited to an across the board percentage of the average cost voucher. If, for example, the EVA set the value of vouchers for non-sectarian schools at $1000 per pupil per year, religious schools would be paid only some fraction of that amount, say $800.

If this reduction were shown to represent the average actual cost of secular education in religious schools, based on overall expenditures less some specified amount for time spent on formal religious instruction, it would be essentially similar in principle to existing purchase of services agreements. The courts might, however, feel that it implied less entanglement, and might therefore hold it constitutional even though rejecting purchase of services laws such as those in Rhode Island, Connecticut, and Pennsylvania. If these laws should be upheld, a voucher system of this type would probably also be upheld.

If the reduction merely represented an arbitrary attempt to limit the funds provided to parochial schools, it might succumb to constitutional challenge from another direction. If, for example, the EVA made an across the board reduction of 20% for religious schools without determining whether these schools could actually provide an adequate secular education at 80% of public school costs, the reduction might violate the Free Exercise clause of the First Amendment. In short, because of his religion, a student would be prevented from receiving the full benefits of an otherwise general welfare program. This may be forbidden by the Free Exercise clause.[24]

(2) Actual Cost Vouchers

This approach would rely on a case by case determination of the actual costs of secular education. Its comparative administrative difficulties vis-a-vis average cost vouchers may be outweighed at present by its greater prima facie constitutional safety. So long as parochial schools are in fact receiving money only for secular functions, Allen seems to hold out promise of protection from constitutional attack.

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[24] *See, e.g.,* Everson v. Board of Education, 330 U.S. 1, 16 (1947): "/A state/ cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-Believers, Presbyterians, or the members of any other faith, because of their faith or lack *of it*, from receiving the benefits of public welfare legislation. /We/ must be careful, in protecting the citizens of New Jersey *against* state established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general law benefits to all its citizens without regard to their religious belief."

While the actual cost of a voucher program would place the burden of establishing the costs of its secular services on the school, it would still leave the school freer to pursue educational innovations than other purchases of specific secular services plans. The amount of the voucher available to parochial schools could be set at a percentage of the per pupil operating costs in public schools which was low enough to cover no more than secular costs. To receive a greater amount, the school would have to establish that it spent more than the minimum fixed amount on secular educational activities. That amount, of course, would never exceed the regular voucher amount provided to secular schools. Schools probably would be required to keep separate books for secular and religious activities. The allowed costs would include materials for secular courses, salaries of teachers, a portion of the administrative costs, etc. Schools might also be required to separate religious and secular activities in time and space. Placing the burden of proof on the schools has the advantage of relieving the state of cumbersome information-gathering problems.

3. Discrimination

If parochial schools are included in a voucher program, the state must monitor schools' admissions processes to prohibit invidious discrimination against certain classes of students. Racial discrimination must be effectively prohibited, not only because participating schools will probably be subject to the equal protection clause of the Fourteenth Amendment (see Appendix B) but because free exercise rights are at stake. Thus it seems unlikely that the courts would countenance an aid program which selectively enabled white Baptists to attend the school of their choice but did not enable black Baptists to do so.

Conceivably, the courts might also prohibit economic discrimination on the grounds that once the state facilitates the religious exercise of some families (i.e., those who can afford tuition at non-public schools) it must aid all families equally either by barring tuition charges or by requiring participating schools to provide scholarships to poor applicants. If it could be shown that economic discrimination (such as tuition charges) was also a form of racial discrimination, the equal protection clause might also be invoked to bar the practice.

Religious discrimination is a more difficult issue. The equal protection clause may not reach to religious discrimination. While denying admission to a student on religious grounds might infringe the Establishment Clause or perhaps the free exercise rights of his family, forcing a school to admit him might be held to infringe the free exercise rights of families with children in the school or of the sponsoring church. As with economic discrimination, however, while religious discrimination may not be invidious per se, religious discrimination which serves as a cover for racial discrimination could be held unconstitutional.

4. Conclusions

This appendix has analyzed the restrictions placed on a voucher program by the First Amendment. There are two basic rationales for including church schools.

1) Any benefit that accrues to a religion is not the result of government action, but rather of the free choice of private individuals

2) A program which pays privately selected church schools no more than the secular value of the education they provide confers no proscribed benefit on religious institutions.

While no one can predict with certainty what the Supreme Court will do when confronted with a voucher program, the Court's recent decisions reject formalistic approaches to church/state issues and try to reconcile the conflict between the Establishment and Free Exercise Clauses with flexibility. The difference in approach in *Everson* (1947) and in *Walz* (1970) highlights this change. In *Everson* the reasoning of the majority began from the relatively strict view that no aid could flow from the state to a religious institution. The decision in *Walz*, on the other hand, rejected what one commentator has called the "Strict Neutrality" approach[25] and embraced a more flexible standard. In the words of Chief Justice Burger, "Any move which realistically 'establishes' a church or tends to do so can be dealt with 'while this Court sits.'"[26] If this attitude continues to inform future church-state decisions, a voucher program which includes church schools freely chosen by parents is likely to be upheld, so long as it does not involve much entanglement of the state in these schools' internal affairs.

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[25] W.D. valente, *Aid to Church Related Education*, 55 *Va. L. Rev*. 579 (1969).

[26] 90 S. Ct. at 1416 (1970).

APPENDIX B

RACIAL SEGREGATION

The appendix reviews the limitations presently placed on racial segregation in schools by the Constitution of the United States and examines the bearing of these limitations on voucher programs.[1] By "segregation" we mean substantial discrepancies in racial composition between schools in the same jurisdiction. Such segregation may arise because of racial discrimination or for other reasons. The constitutionality of three different kinds of segregated voucher programs will be examined: (1) voucher programs whose purpose is to aid schools which deliberately exclude children on the basis of race;[2] (2) voucher programs which, regardless of

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[1] At least five states have enacted Fair Education Practices Acts which prohibit racial discrimination in some or all private schools. They are Massachusetts, New Jersey, New York, Pennsylvania, and Washington. Citations to the specific statutes may be found in Emerson, Haber and Dorsen, 1 Political and Civil Rights in the United States 1793 (3rd. ed. 1967.)

Such legislation should theoretically make it unnecessary to obtain a legal ruling on the constitutionality of racial discrimination in voucher schools in those states.

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[2] It is not entirely clear what actions constitute "deliberate exclusion." The federal cases have so far dealt primarily with public schools. Voucher programs would utilize private, or at least semi-private, schools as well. This raises a host of new questions. Public schools generally have been able to discriminate only in the actual admissions process - i.e., by denying admission on the basis of race. They generally have had little or no contact with potential applicants who are usually "selected" by school boundary lines.

Voucher schools, whether public or private, would have a less defined pool of potential applicants. Exclusion achieved by advertising that "We give failing grades to all black students" would seem as potent as exclusion in the actual admissions process. It remains to be seen where the courts will draw lines as to what constitutes deliberate discrimination and exclusion.

When we describe schools as "deliberately organized to exclude children on the basis of race," we assume there is deliberate racial exclusion in accepting or rejecting applications. This does not foreclose the possibility the courts will expand the definition of what constitutes "deliberate exclusion."

One possible expansion may be grounded on Justice Brennan's command that schools be neither black nor white, "but just schools." Green v. County School Board, 391 U.S. 431, 442 (1968). Thus if any school is generally identifiable as either a black or a white school, the resulting segregation may be unconstitutional.

Alternatively, courts may focus on blacks' right of association in publicly supported institutions. See, e.g., Mayor and City Council v. Dawson, 350 U.S. 877 (1955) (per curiam) (forbidding racial segregation on public beaches and in public bathhouses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (forbidding racial segregation on public golf courses); Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (forbidding racial segregation on public busses); New Orleans City Park Improvement Assoc. v. Detiege, 358 U.S. 54 (1958) (per curiam) (forbidding racial segregation in public golf courses and other facilities);Turner v. City of Memphis, 369 U.S. 350 (1962) (per curiam) (forbidding racial segregation in publicly operated facilities).

Another possible expansion may result if the "unitary" standard established in Alexander v. Holmes County Board of Education, 90 S. Ct. 24 (1970), is taken to bar schools from which students are "effectively excluded" on the basis of race.

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purpose, have the effect of aiding such schools; and (3) voucher programs in which neither the state nor the schools discriminate against students on the basis of race, but in which segregation nonetheless persists.

The three categories are more distinct in theory, however, than in practice. Effect is often used to prove "purpose," for example. Furthermore, the difficulty of knowing which of the three fact patterns is presented may itself, in some instances, place a duty on the state to protect against the more invidious form. Thus although the appendix will be organized into three sections, the content of the sections in some cases will overlap.

The mandate of Brown v. Board of Education[3] is clear: states may not maintain schools which are racially segregated as a matter of state law or policy.[4] It is not yet clear what a state must do to eliminate such unconstitutional segregation, but courts have applied more stringent requirements in those jurisdictions which previously maintained such schools than elsewhere.[5] Each of the three sections will therefore discuss separately the law (a) in jurisdictions under court order to end unconstitutional segregation and (b) in all other jurisdictions.

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[3] 347 U.S. 483 (1954).

[4] We will avoid using the terms "de jure" and "de facto" segregation. These labels are conclusions of law, not descriptions of situations which aid analysis. In view of the different conclusions of law drawn by different courts in similar factual situations, one might conclude that notions of judicial roles (activism or restraint) or proficiency of counsel in presenting facts determines the result in individual cases. These hardly lead to a useful theory of the law in this area. Predictions will remain difficult until the Supreme Court provides more definitive guidelines.

[5] See, e.g., Brown v. Board of Education, 349 U.S. 294 (1955) (Brown II) "the courts will require that the defendants make a prompt and reasonable start toward full compliance with Brown I ... the courts are to ... enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially non-discriminatory basis with all deliberate speed the parties to these cases;" Green v. County School Board, 391 U.S. 430 (1968): "School boards ... operating state compelled dual systems were ... clearly charged with the affirmative duty to take whatever steps might be necessary to convert to unitary systems in which racial discrimination would be eliminated root and branch." (Italics added.)

1. Voucher Programs Whose Purpose is to Aid Schools Which are Organized to Exclude Children on the Basis of Race are Unconstitutional.

Federal courts have repeatedly held that voucher programs established with the purpose of aiding racially segregated schools are unconstitutional.[6] But it is often difficult to establish what in fact was the purpose of a challenged statute. Courts have traditionally followed the rule enunciated by the first Justice Harlan:

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[6] *See, e.g.*, Coffey v. State Educational Finance Comm'n; 296 F. Supp. 1389 (S.D. Miss. 1969); Brown v. South Carolina State Board of Educ., 296 F. Supp. 199 (D.S. Cal. 1968), *aff'd per curiam*, 393 U.S. 222; Poindexter v. Louisiana Financial Assistance Com'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968); Lee v. Macon County Board, 267 F. Supp. 458 (M.D. Ala. 1967).

For other federal decisions holding voucher programs unconstitutional, see Griffin v. State Board of Education, 296 F. Supp. 1178 (E.D. Va. 1969); Poindexter v. Louisiana Financial Assistance Comm'n, 296 F. Supp. 686 (E.D. La. 1968); Hawkins v. North Carolina State Board of Educ., 11 Race Rel. L. Rep. 745 (W.D.N.C. 1966); Lee v. Macon County Board, 231 F. Supp. 743 (M.D. Ala. 1964); Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. La. 1961), *aff'd per curiam*, 368 U.S. 515 (1962). *Cf*. Plaquemines Parish School Board v. U.S., 415 F. 2d 817 (5th Cir. 1969) (forbidding sale or transfer of public school property to discriminatory private schools).

The extent to which courts will go to prevent any aid going to discriminatory private schools is indicated by the recent ruling in Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970). There a three judge district court granted a preliminary injunction against tax benefits (which are traditionally sacrosanct) because they went to segregated private Mississippi schools.

> The purpose of legislation is to be determined by its natural and reasonable effect, and not by what may be supposed to have been the motives upon which the legislators acted.[7]

But recognition of the distinction between purpose and motive has not deterred courts from looking beyond the face of voucher statutes. Two other tests of purpose have generally been used in evaluating voucher programs: (1) legislative history and setting and (2) effect.

The precedent for looking at the legislative history and setting of a statute was established by the Supreme Court in Grosjean v. American Press,[8] in which the Court held unconstitutional a tax on newspaper and theatre advertising that was on its face unobjectionable. A unanimous Court explained:

> /The tax/ is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled by virtue of the constitutional guaranties.[9]

A brief review of two of the federal voucher decisions affirmed by the Supreme Court illustrates how far courts will go in judging the purpose of a voucher statute by its history or setting, irrespective of the apparent racial neutrality of the terms of the statute.

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[7] People v. Roberts, 171 U.S. 658 (1898).

[8] 297 U.S. 233 (1936).

[9] Id. at 250.

In Hall v. St. Helena Parish School Board,[10] a three judge federal district court ruled unconstitutional a Louisiana statute which would have allowed counties to close their public schools, sell or lease them to others, and then provide aid to the new "private schools" in the form of tuition checks made out to the parents and the school.

The statute did not include any specific reference to race. Nonetheless, the court refused to allow what it saw as an "evasive scheme." It found that, "irrespective of the terms of the statute," the purpose of the statute was to aid segregated schools.[11] In its determination of the purpose of the Act, the court examined public statements by sponsors of the legislation. It concluded that the Act was "a transparent artifice designed to deny the plaintiffs their declared constitutional rights to attend desegregated public schools."[12]

In Poindexter v. Louisiana Financial Assistance Comm'n,[13] a later version of the tuition voucher program first held unconstitutional in Hall was also declared unconstitutional by a three judge federal district court. The revised statute transferred administration of the tuition grants from the Board of Education to a Louisiana Financial Assistance Commission, provided direct grants to the parents (rather than to the parents and schools jointly as in Hall), and waived the requirement that eligible schools had to be non-profit.

The court, however, was not persuaded that any of these changes made the new law constitutional. Rather, it took note of legislators' statements that the change in administrative procedure was made for the purpose of avoiding earlier court rulings. The changes themselves supported the court's finding that the new statute was also intended to aid segregated schools.

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[10] 197 F. Supp. 649 (E.D. La. 1961), aff'd per curiam, 368 U.S. 515 (1962).

[11] 197 F. Supp. at 652.

[12] Id. at 651.

[13] 275 F. Supp. 833 (E.D. La. 1967) aff'd per curiam, 389 U.S. 571 (1968).

As in _Hall_, the court relied on public statements made by the sponsors of the legislation rather than the terms of the statute itself in reaching its determination that the purpose of the new statute was to aid segregated private schools.

Hall and _Poindexter_ demonstrate, therefore, that in determining the purpose of voucher statutes courts will not be content to examine merely the terms of such statutes. They will instead thoroughly consider both the history and setting of any such legislation.

In addition, courts have judged the purpose of voucher statutes by considering their probably or actual _effect_.[14] The rationale for this was presented by the Supreme Court in _Gomillion v. Lightfoot_:

> When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review, but such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.[15]

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[14] It is generally sufficient to show that the _probable_ effect of a statute is to provide aid to schools which exclude students on the basis of race. _Actual_ effect need not be shown. _See, e.g._, Brown v. South Carolina State Board of Educ., 296 F. Supp. 199 (D.S.C. 1968), _aff'd per curiam_, 393 U.S. 222; Poindexter v. Louisiana Financial Assistance Comm'n, 296 F. Supp. 686 (E.D. La. 1968). _Cf_. Gomillion v. Lightfoot, 364 U.S. 339 (1960). It would be unwise, however, to rely on this approach where the "probable" effect is a highly speculative prediction.

[15] 364 U.S. 339, 347 (1960).

Gomillion involved the power of a state legislature to determine municipal boundaries. On its face, the law was unobjectionable. Nonetheless, the Court ruled that if the effect of the law was to deprive black citizens of the benefits of municipal residence, including the right to vote in municipal elections, then it was unconstitutional.

There are several reasons why the court may judge purpose by effect when voucher statutes are at issue. First, the law traditionally holds a man responsible for the foreseeable effects of his actions. Legislators should be held to no less strict a standard when their actions affect such critical government functions as the protection of the rights of racial minorities and the provision of education. As the Supreme Court pointed out in Brown v. Board of Education:

> Education is perhaps the most important function of state and local government.... In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education.[16]

Indeed educational opportunity may be even more crucial to the poor or disadvantaged because it is a traditional, if not always accessible, route to break free of poverty.[17]

In addition, it might be particularly difficult for a private individual who had suffered discrimination because of a legislative action to prove discriminatory purpose by reference to statements of legislators or similar means. As courts have increased their scrutiny, legislatures have become more sophisticated. Allowing evidence as to effect, therefore, seems necessary to ease the problems of proof of legislative intent when racial discrimination is at issue.

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[16] 347 U.S. 483, 493 (1954).

[17] For a more complete discussion, see Coons, Clune & Sugarman, Private Wealth and Public Education (1970); Kirp, The Poor, the Schools and Equal Protection, 38 Harvard Educational Review, 635 (1968). Cf. Kurland, Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined, 35 U. Chi. L. Rev. 583 (1968).

In short, it seems clear that a statute which has the probable or actual effect of aiding schools which discriminate on the basis of race can lead to a judicial finding that the *purpose* of the program was to aid such schools, and hence, that the program is unconstitutional.

All of the voucher cases to date have arisen in jurisdictions in which unconstitutional segregation had been previously found. Yet there is no reason to think that courts in other jurisdictions would decide differently if the purpose of the voucher program were to aid schools which discriminated on the basis of race. Courts in other jurisdictions might, however, be less willing to judge purpose by effect alone.

Recent cases holding segregation unconstitutional in Colorado,[18] Illinois,[19] California,[20] and Michigan,[21] indicate a new judicial willingness to scrutinize carefully the causes of segregation outside of the South. While effect alone was not used to prove purpose, it was sufficient to shift the burden to the state or school board to prove that its purpose was *not* to further segregation.[22]

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[18] Keyes v. School Dist. No. One, 303 F. Supp. 280 (D. Colo. 1969); *stayed* __ F.2d __ (10 Cir.), *stay removed* ___ U.S. ___ , *aff'd on rem.* 313 F. Supp. 61 (1970).

[19] United States v. School Dist. 151 of Cook County, Ill, 301 F. Supp. 210 (N.D. Ill. 1969)

[20] Spangler v. Pasadena City Board of Educ., 311 F. Supp. 501 (C.D. Cal. 1970); Crawford v. Board of Educ. of Los Angeles County, Civ. Action No. 822854 (Ca. Sup. Ct. 1970).

[21] Davis v. School Dist. of Pontiac, Michigan, Civ. Action No. 32392 (E.D. Mich. 1970); Berry v. School Dist., Civ. No. 9 (W.D. Mich. Feb. 17, 1970) (Benton Harbor).

[22] *See also* Lee v. Nyquist (New York anti-bussing law ruled unconstitutional) __ F. __ Supp. (D.N.Y. 1970) and text at notes 64-65, *infra*.

The practical effect of this shift is to weight the outcome in favor of finding purpose on the basis of effect alone.

2. A Voucher Program whose Effect is to Aid Schools Which Are Organized to Exclude Children on the Basis of Race is Probably Unconstitutional

Even if the purpose of a voucher statute is not to aid racially discriminatory schools, courts may prevent aid to such schools on the grounds that receipt of vouchers makes all voucher schools subject to the equal protection clause of the Fourteenth Amendment. Thus, effect alone, while it may not establish that furthering racial discrimination was the purpose of the statute, may be sufficient to block an entire voucher program or at least to block the participation of racially discriminatory schools.

Two standards are traditionally used to judge whether nominally private action is in fact state action subject to the Fourteenth Amendment: (1) the public nature of the function performed by the private body, and (2) the amount of state support (financial or other) of the activity. The following discussion argues that voucher schools would qualify under either standard alone, and certainly under the combination.

The public function theory was supported by the Supreme Court in Evans v. Newton[23] where the Court held that a private park which was left in trust to a city was subject to the equal protection clause. The Court explained.

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[23] 382 U.S. 296 (1966). For a subsequent case in which the same park was awarded to the heirs of the donor on the grounds that under state law the city had violated the terms of the trust by integrating the park see Evans v. Abney, 90 S. Ct. 628 (1970).

> This concluusion is buttressed by the nature of the service rendered the community by a park. The service rendered even by a private park of this character is municipal in nature.
>
> A park ... is more like a fire department or police department that traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain ... and state courts that aid private parties to perform that public function on a segregated basis implicate the state in conduct proscribed by the Fourteenth Amendment. Like the streets of the company town in Marsh v. Alabama,[24] ... the elective process of Terry v. Adams,[25]... and the transit system of Public Utilities Comm'n v. Pollak[26] ... the predominant character and purpose of this park is municipal.[27]

Significantly, Justice Harlan dissented from this majority opinion precisely because he felt that it meant private schools were also subject to state action. In his words:

> Like parks, the purpose schools serve is important to the public. Like parks, private control exists, but there is also a very strong tradition of public control in this field. Like parks, schools may be available to almost anyone of one race or religion but to no other. Like parks, there are normally alternatives for those shut out but there may also be inconveniences and disadvantages caused by restriction. Like

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[24] 326 U.S. 501 (1946).

[25] 345 U.S. 461 (1953).

[26] 343 U.S. 451 (1952).

[27] 382 U.S. 296, 301-302 (1966).

> parks, the extent of school intimacy varies greatly depending on the size and character of the institution.[28]

In addition to the decisions mentioned by the Supreme Court in Evans v. Newton, supra, numerous otherwise private activities have been held subject to the state action doctrine because of the public function involved.[29]

But if a showing of public function is not in itself sufficient to support state action, the addition of state financial and administrative involvement would seem to compel such a finding. In

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[28] 382 U.S. at 321 (Harlan, J. dissenting). In a similar vein Judge J. Skelly Wright has held: "At the outset one may question whether any school or college can ever be so 'private' as to escape the reach of the Fourteenth Amendment. /I/nstitutions of learning are not things of purely private concern .... No one any longer doubts that education is a matter affected with the greatest public interest. And this is true whether it is offered by a public or private institution. Clearly the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state's shoes? And, if so, are they not agents of the state, subject to the constraints of government action, to the same extent as a private person who governs a company town ... or controls a political party ....? Reason and authority strongly suggest that the Constitution never sanctions racial discrimination in our schools and colleges, no matter how 'private' they may claim to be." Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855, 858-59 (E.D. La. 1962), opinion vacated on other grounds, 207 F. Supp. 554, aff'd 306 F.2d 489 (5th Cir. 1962).

[29] E.g., Smith v. Allwright, 321 U.S. 649 (1944) (primaries are integral part of election process, fixing primary voter qualifications is therefore a delegation of a state function); Farmer v. Moses, 232 F. Supp. 154 (S.D.N.Y. 1964) (purpose of World's Fair Corporation included education, which court considered a "proper function of the state," making the World's Fair Corporation an "instrumentality" of the state to carry on its work); Smith v. City of Birmingham, 226 F. Supp. 838 (N.D. Ala. 1963) (lease of restaurant located in Municipal Airport held to show public function).

Burton v. Wilmington Parking Authority,[30] for example, the Supreme Court held that a privately-owned restaurant, leased from the state and located in the state-managed public garage, was covered by the Fourteenth Amendment's prohibition on racial discrimination. While the Court disclaimed any simple rule, insisting that the circumstances must be weighed in each case, it examined the following factors: the amount of state financial aid; the degree of state regulation (lease with state, rest of building devoted to public uses); the extent to which the restaurant performed a public function due to its location in a public building and participation in the state's plan for providing public services; and the interdependence of the state and restaurant owner in receiving and conferring mutual benefits. Because the state had a responsibility to ensure equal treatment, state inaction (in not requiring a covenant of equal treatment) in this case was held to be state action (supporting discrimination).

More recently in Simkins v. Moses H. Cone Memorial Hospital,[31] the Fourth Circuit Court of Appeals held that participation in the Hill Burton Hospital Construction program[32] made a private hospital subject to the Fourteenth Amendment. In reaching its decision in the Simkins case, the court laid stress not only on the public funds paid by the United States through North Carolina to the hospital, but also "the elaborate and intricate pattern of governmental regulations" to which the hospital became subject under Hill-Burton. The court relied in particular on the fact that the state was required to submit for approval to the Surgeon General a "hospital construction plan" which, among other things, met requirements forbidding racial discrimination.

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[30] 365 U.S. 715 (1961).

[31] 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964). Accord Cypress v. Newport News General and Non-Sectarian Hospital Assoc., 392 F.2d 89 (1967).

[32] 60 Stat. 1041 (1946), as amended, 42 U.S.C.A. § 291(e)(f).

Eaton v. Grubbs,[33] a later Fourth Circuit decision, extended Simkins to a North Carolina hospital which had not received a grant under Hill-Burton. "State action" was found in the fact that the hospital had been forced to obtain a license from the state, and in such factors as past construction aid from the city and county, local tax exemptions, and a reverter clause in the deed which required the property to be operated as a hospital.

The rationale of Simkins and Eaton would seem to extend to voucher schools.[34] First, voucher programs would undoubtedly imposed financial restrictions on participating schools sufficient to ensure that the public monies were being used in an appropriate fashion. Requirements establishing accounting procedures and reporting obligations would probably be necessary, for example. Second, most states have certain curriculum requirements, applicable to all schools, such as requirements that all pupils take a course in American history. The combination of regulations that would result could be sufficient basis for a court to find participating schools subject to state action. Third, the financial support supplied to participating schools adds a further justification for a finding of state action.

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[33] 329 F.2d 710 (4th Cir. 1964).

[34] Cases involving due process or free speech issues have reached different results. See, e.g., Powe v. Miles, 407 F.2d 73 (2nd Cir. 1968). But they are distinguishable on at least two grounds: (1) the composition of the student body is more directly tied to state aid than student discipline is and (2) the state action doctrine may be treated differently where equal protection is at issue. See note 40 infra.

While it has been argued that state action arises only when the state supplies the predominant financial support of a school, the one court decision accepting this view[35] was both soundly repudiated in Poindexter v. Louisiana Financial Assistance Comm'n[36] and specifically overruled.[37] The Poindexter court held:

> Decisions on the constitutionality of state involvement in private discrimination do not turn on whether the state aid adds up to 51 per cent or adds up only to 49 per cent of the support of the segregated institution. The criterion is whether the state is so significantly involved in the private discrimination as to render the state action and the private action violative of the equal protection clause.[38]

Certainly the Supreme Court has never suggested that there must be a showing of predominant state support in order to find state action.[39] On the contrary, in Simkins, for example, the government funds provided only 17% of the cost of two additions to the hospital, a sum which represented an even smaller percentage of total operating costs.[40]

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[35] Griffin v. State Board of Educ., 239 F. Supp. 560, overruled 296 F. Supp. 1178 (E.D. Va. 1969).

[36] 275 F. Supp. 833(E.D.La.1967)aff'd per curiam, 389 U.S. 571 (1968).

[37] See note 35, supra. For a history of the Griffin litigation see note 42, infra.

[38] 275 F. Supp. at 854.

[39] See, e.g., text at notes 23-29, supra.

[40] It may be that it is unnecessary to worry about proving state action for participating voucher schools. See, Black, State Action Equal Protection and California's Proposition 14, Introduction to the Supreme Court 1966 Term, Harv. L. Rev. (1967). Professor Black dismisses state action arguments as fictitious barriers that have received no support since the Civil Rights Cases of 1883. State action is, in his opinion, "a hope in the minds of racists (whether for love or profit) that somewhere, somehow to some extent, community organization of racial discrimination can be so neatly managed as to force the Court admiringly to confess that this time it cannot tell where the pea is hidden." He dismisses Justice Harlan's worry that there is no reasonable limit to the extensions opened by Evans v. Newton by suggesting that a reasonable approach is that the limits of equal protection begin where other constitutional guarantees begin, or with matters with which the law does not commonly deal: i.e., schools may be regulated, but not private dinner invitations.

The clearest rejection of the predominant state support argument is made in Griffin v. State Board of Education.[41] The decision also affirms the position that effect alone is a sufficient basis for rejecting a voucher plan, although its language must be read in light of the extensive history which preceeded the case.[42] The court held:

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[41] 296 F. Supp. 1178 (E.L. Va. 1969).

[42] The history of the Griffin litigation covers over 19 years. In 1951 a group of Negro school children living in Prince Edward County, Virginia, first filed a complaint in the federal district court charging that they had been denied admission to the public schools in violation of the equal protection clause of the Fourteenth Amendment. Their case was one of those ruled on in the landmark Brown decision. In 1956 Virginia first passed legislation to close integrated public schools and to provide instead tuition vouchers to enable children to atten d private (and segregated) schools. The public schools in Prince Edward County remained closed from 1959 until 1964. Another suit challenging this action also went up to the Supreme Court who ruled that the closing of the schools was unconstitutional. Griffin v. County School Board of Prince Edward County, 377 U.S.218 (1964). The Court was moved to order that the district court require the local authorities to levy taxes if such an extraordinary move were necessary in order to reopen and maintain the public schools.

Fearful that the tuition program would nonetheless continue, the court was requested to enjoin further payments. Although the state was notified that no payments were to be made, the Prince Edward Board of Supervisors met and distributed some $180,000 in voucher checks on the night of August 5, 1964.

When the public schools finally opened that September, all the white children were in private schools supported by tuition vouchers.

A three judge district court refused to hold the entire voucher statute unconstitutional, on the grounds that aid to schools which discriminated was unconstitutional only if it predominantly maintained such schools. Griffin v. State Board of Educ. 239 F. Supp. 560 (Griffin II).

After the Supreme Court had affirmed a ruling that any aid to segregated schools was forbidden (Poindexter), the 1965 decision was reversed and the entire statute was held unconstitutional. Griffin v. State Board of Education, 296 F. Supp. 1178 (E.D.Ca. 1969) (Griffin III).

> The Supreme Court holds in our reading that the validity of a tuition plan is to be tried on a severer issue [than the predominance test]; whether the arrangement in any measure, no matter how slight, contributes to or permits continuance of segregated public school education. This pronouncement is uncompromisingly dictated in the Court's approval of the decrees [striking down the tuition grant laws of Louisiana and South Carolina]. Testifying to the immediacy, thoroughness and completeness of the concurrence, both decisions were confirmed on motion without oral argument.
>
> In our judgment, it follows that neither motive nor purpose is an indispensable element of the breach. The effect of the State's contribution is a sufficient determinant with effect ascertained entirely objectively.[43]

In summary, voucher schools appear to be subject to the equal protection clause of the Fourteenth Amendment under the state action doctrine because: (1) they perform a public function; (2) they are subject to extensive state regulation; and (3) they receive state financial support.

The state action doctrine, although it has to date been applied primarily to schools in jurisdictions where unconstitutional segregation had already been found, would appear to apply with equal vigor to all jurisdictions, both because education is involved,[44] and in light of several recent decisions.

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[43] 296 F. Supp. at 1181. *See also* Lee v. Macon County Board, 231 F. Supp. 743, 745 (M.D. Ala. 1964): "As to that aspect of this case relating to grant-in-aid payments by the State of Alabama for the education of students in racially segregated schools, this court is of the firm conclusion that such payments would be unconstitutional where they are designed to further *or have the effect of furthering* said segregation in the public schools." (emphasis added).

[44] In the words of the *Poindexter* court: "what constitutes significant forbidden involvement may depend on the case. In the exercise of the right to vote, the prohibited involvement may be very slight. [*See, e.g.*], Anderson v. Martin, 375 U.S. 399 (1964) (voiding requirement that candidates for office be identified by race on the ballot). The same principle should apply in the field of education. [*See, e.g.,*] Commonwealth of Pennsylvania v. Brown." 275 F. Supp. at 792.

In *Mulkey v. Reitman*,[45] the Supreme Court implied that state indifference in racial matters may itself be proscribed, when it encourages private discrimination. In the words of Mr. Justice Douglas:

> Proposition 14 is a form of sophisticated discrimination whereby the people of California harness the energies of private groups to do indirectly what they cannot under our decision allow their government to do.[46]

Commonwealth of Pennsylvania v. Brown,[47] is even more on point. This case was part of a long line of cases involving Girard College which had been left in trust to the City of Philadelphia on the condition that it be limited to poor, male, white orphans.

In 1957 the Supreme Court had held that for the City to serve as trustee of the College was governmental discrimination barred by the Fourteenth Amendment.[48]

The City consequently was removed as trustee and private trustees were appointed. The plaintiffs citing *Evans v. Newton*, claimed their fourteenth amendment rights were being violated nonetheless. The district court agreed, noting in particular: (1) reports made to the State by the school; (2) the general supervision of the State Department of Public Instruction and other agencies "concerned with the education and welfare of the young"; (3) a state approved tax exemption; (4) performance of a service which would otherwise have to be performed by the public school system, since students at Girard were by definition unable to pay for education; and (5) "substantial collaboration between the College and principals at various city schools."[49]

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[45] 387 U.S. 369 (1967).

[46] *Id*. at 377 (concurring opinion). The Court there upheld the California Supreme Court's finding that Article I, Section 26 of the California Constitution, popularly known as Proposition 14, was unconstitutional. The Section provided: "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

[47] 270 F. Supp. 782 (E.D. Pa. 1967), *aff'd*, 392 F.2d 120 (3rd Cir. 1968), *cert*. *denied*, 391 U.S. 921.

[48] 353 U.S. 230 (1957).

In the words of the court:

> Pennsylvania has overseen and approved both the education and upbringing of students at Girard College and the operation of the institution as a school and as an orphanage, serving an obvious public function.... We find it logically and legally impossible to escape the conclusion that racial exclusion at Girard College is so affiliated with state action, in its widened concept, that it cannot constitutionally endure.[50]

The ruling on the Girard situation, as well as the Mulkey case, thus strongly supports a finding that schools participating in in a voucher program are subject to state action, even in jurisdictions where segregation has not previously been held unconstitutional.

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[49] The "substantial collaboration" significantly was described by the court as follows: "Representatives of the College have maintained contacts with public school officials for the purpose of soliciting applications from students attending public schools who would be qualified to attend Girard College. Thus it is a reasonable inference that public school authorities have referred potential applicants to an institution which they must have known engaged in racial discrimination." 270 F. Supp. at 791.

[50] 270 F. Supp. at 792.

3. Voucher Programs Whose Effect is to Aid Schools Which Are Segregated In Fact Although Not as a Matter of Policy May Be Unconstitutional in Jurisdictions Obligated to End a Dual School System: In Other Jurisdictions They Are Probably Constitutional.

The Supreme Court has held:

> School boards ... operating state-compelled dual systems were ... clearly charged with the *affirmative* duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.[51]

Although some decisions have suggested that this affirmative duty is not satisfied until *no* segregated schools exist,[52] a recent decision of the Fifth Circuit Court of Appeals suggests that this standard may have been abandoned,[53] so that if segregated schools reflect only neighborhood segregation (i.e., what has been considered non-actionable segregation in some other jurisdictions), the duty may, nonetheless, have been fulfilled.

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[51] Green v. County School Board, 391 U.S. 431 (1968) (emphasis added.)

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[52] *See*, *e.g.*, Adams v. Mathews, 403 F.2d 181, 188 (5th Cir. 1968): "If in a school district there are still all-Negro schools or only a small fraction of Negroes enrolled in white schools or no *substantial* integration of faculties and school activities, then, as a matter of law, the existing plan fails to meet constitutional standards as established in *Green*."

For other post-*Green* courts of appeals decisions ruling freedom of choice plans unacceptable, see Board of Public Instruction of Duval County, Fla. v. Braxton, 402 F.2d 900 (5th Cir. 1958) (no white children in black schools); Anthony v. Marshal County Board of Educ., 409 F.2d 1287 (5th Cir. 1969) (less than 3.2% blacks in white schools, no whites in black schools); Felder v. Harnett County Board of Educ., 409 F.2d 1070 (4th Cir. 1969) (only 4.3% of black students in previously all white schools, no white students in black schools); Walker v. County School Board of Brunswick County, Va., 413 F.2d 53 (4th Cir. 1969) ("relatively little" integration had occurred); Davis v. Board of School Comm'rs of Mobile County, 414 F.2d 609 (5th Cir. 1969) (only 6% of the black students in previously all white schools, no whites in black schools); Jackson v. Marvell School Dist. No. 22, 416 F.2d 380 (8th Cir. 1969) (12% blacks in white schools, only 36 whites in black schools); United States v. Lovett, 416 F.2d 386 (8th Cir. 1969) (only 110 blacks in formerly all white schools and no whites in black schools); United States v. Choctaw County Board of Educ., 417 F.2d 838 (5th Cir. 1969) (onlytoken desegregation); United States v. Hinds, 417 F.2d 852 (5th Cir. 1969), *cert. denied*, 38 U.S.L.W. 3265 (1/20/70) (no whites in black schools); Hall v. St. Helena Parish School Board, 417 F.2d 801 (5th Cir. 1969), *cert. denied*, 90 Sup. Ct. 218 (no whites or only small percentage in formerly all black schools).

Voucher programs, which are based on parents' freedom to choose which school in the district he wishes his child to attend, clearly resemble the freedom of choice plans which have already been the subject of much litigation. In Green v. County School Board,[54] the Supreme Court announced that the following standard would be applied to such plans:

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[53] Ellis v. Orange County, Fla., Civ. Action No. 29124 (5th Cir. 1970). Geographic zoning will not end the dual school system in the South. Although it might end physical segregation in some less urbanized areas and in small cities, in the larger cities such racially neutral criteria as geographic zoning would leave most schools segregated. See Cohen, Defining Racial Equality in Education, 16 U.C.L.A. L. Rev. 255, 265 (1969).

In Ellis, a three judge court ruled that the Orange County public school system could adopt a system of neighborhood schools, even though three elementary schools would remain all black.

The extent to which this holding indicates a change of policy is not clear. First, the court carefully limited the decision to the facts of the case, holding: "Under the facts of this case, it happens that the school board's choice of a neighborhood assignment system is adequate to convert the Orange County School System from a dual to a unitary school system. This does not preclude the employment of differing assignment methods in other school districts. The answer in each case turns, as here, on all the facts including those which are peculiar to the particular school system."

In addition, Ellis involved a system based on geographic zones so its applicability to freedom-of-choice plans is not clear. See cases cited note 52, supra for decisions involving freedom of choice plans. Cf. Henry v. Clarksdale Municipal Separate School Dist., 409 F.2d 682 (1969) another Fifth Circuit decision involving geographic zones which had produced only token integration. The board was there ordered to redraw the lines so as to "maximize desegregation or eliminate segregation."

The Supreme Court is now grappling with these issues in Swann v. Charlotte-Mecklenburg Board of Educ., No. 281, and Davis v. Board of School Commissioners of Mobile County, et. al., No. 436. A decision should be rendered during the 1970-71 term of the Court.

[54] 391 U.S. 430 (1968). See also Raney v. Board of Educ., 391 U.S. 443 (1968); Monroe v. Board of Commissioners, 391 U.S. 450 (1968).

> Freedom of choice plans are not unconstitutional unless "there are reasonably available other ways ... promising speedier and more effective conversion to a unitary, nonracial school system."

This stringent standard will presumably be followed in evaluating any voucher plans adopted in jurisdictions in which unconstitutional segregation has been found. Unless they are more successful in fulfilling the duty to disestablish such segregation than most freedom of choice plans have been,[55] therefore, voucher plans are likely to be found unconstitutional in such jurisdictions.

Moreover, even if the courts did not find intentional state discrimination, they might nonetheless enjoin any program which lacked sufficient safeguards against discrimination. Thus, in Griffin v. State Board of Education,[56] a federal district court held unconstitutional a state legislated tuition voucher plan, despite arguments that grants to individual schools which discriminated could be stopped without enjoining the entire program. In the words of that court:

> The canvassing and policing of the tuition law to confine its enjoinment to instances /which do not further segregation/ would be a Herculean task. It could hardly give full assurance against the abuse of the law. A law may, of course, survive despite its unacceptable consequences, if the valid portions may be independently enforced. Here, as we see, there can be no such separation and the entire law must go.[57]

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[55] See cases cited note 52, supra.

[56] 296 F. Supp. 1178 (E.D. Va. 1969). See note 42 , supra.

[57] Id. at 1182.

The court's language could mean that no voucher plan will ever be acceptable because of the danger of aiding discriminatory schools. More reasonably, however, the decision places a heavy responsibility on any governmental body about to adopt a voucher plan. It must devise one in which the state itself polices discrimination to the satisfaction of the courts.

The Commissioners on Uniform State Laws have promulgated a Model Anti-Discrimination Act which provides, for example, that it is a discriminatory practice for any educational institution:

> 1. to exclude, expell, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student, in the terms, conditions, and privileges of the institution because of race, color, religion, or national origin; or
> 2. to make or use a written or oral inquiry or form of application for admission that elicits or attempts to elicit information or to make or keep a record, concerning the race, color, religion or national origin of an applicant for admission, except as permitted...; or
> 3. to print or publish or cause to be printed or published a catalogue or other notice or advertisement indicating a preference, limitation, specification, or discrimination based on the race, color, religion, or national origin of an applicant for admission.[58]

This could serve as a model for a voucher statute, but again, defining violations is probably not sufficient in light of Griffin v. The State Board of Education.[59] Adequate enforcement mechanisms may also be required. At a minimum, such machinery would have to include the authority to investigate complaints of deliberate segregation, to initiate investigations in the absence of such complaints, to make findings of fact, conduct hearings, make judgments, and prohibit the use of vouchers in schools found to be discriminatory.

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[58] See note 1, supra.

[59] See note 56, supra.

Investigative procedures, though, may not be sufficient either. Certainly the difficulty HEW has experienced in establishing adequate administrative procedures to prevent racial discrimination in _public_ schools[60] indicates the task will be practically insurmountable when _private_ schools are involved. Clearly the admissions procedures of private schools are not only more complex, but are also less open to public inspection.

The only adequate mechanism, therefore, may be a quota system, such as that proposed in Section II, which requires all voucher schools to admit at a minimum the same percentage of minority students as apply.

The constitutionality of voucher programs in all other jurisdictions is related to the constitutional status of what some courts have chosen to label as _de facto_ segregation - segregation which does not result from purposeful exclusion of students on the basis of race by either the state or the schools.

At the moment, this status is unclear. Courts in many Northern school segregation cases have ruled that segregation is unconstitutional only if there has been affirmative official action.[61]

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[60] _See_ Note, _The Courts, HEW and Southern School Desegregation_, 77 _Yale L.J._ 321 (1967) for a description of the difficulties HEW has encountered in attempting to police discrimination in public schools.

[61] _See_, _e.g._, Deal v. Cincinnati Board of Educ., 367 F.2d 55 (6th Cir. 1966), _cert_. _denied_, 389 U.S. 847 (1967); Downs v. Board of Educ., 336 F.2d 988 (10th Cir. 1964), _cert_. _denied_, 380 U.S. 914 (1965); Bell v. School City of Gary, Indiana, 324 F.2d 209 (7th Cir. 1963), _cert_. _denied_, 377 U.S. 924 (1964).

These decisions concluded that when a local school board establishes school districts on the basis of nonracial factors (geographic barriers, proximity,school space, etc.) the racial composition of the schools is not constitutionally challengeable.

A rationale for this position was set forth in Norwalk CORE v. Norwalk Board of Education:

> If a neighborhood school system has been equitably administered without regard to race, theoretical mobility is believed to exist by which movement can be made between neighborhoods, and thus between schools.[62]

In other words, because a racially neutral neighborhood school policy need not necessarily lead to segregation, it should be permitted.

But even if courts continue to find segregation resulting from neighborhood schools constitution, some voucher programs could nonetheless, be ruled unconstitutional.

Recent decisions in Colorado, Illinois, California and Michigan have found that certain actions of Northern and Western school boards were unconstitutional segregation. These decisions demonstrate a judicial willingness outside of the South to scrutinize carefully the causes of racial segregation.[63] The language of these cases may be consistent with other courts' support of de facto segregation, but the analysis of facts and conclusions derived therefrom clearly are not.

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[62] 298 F. Supp. 213 (D.C. Conn. 1969) aff'd, 423 F.2d 121 (2nd Cir. 1970). The "mobility" described may, however, be just theoretical. Racial discrimination in housing persists, the result of federal state, local and private racial discrimination. Furthermore, the interrelationship between housing patterns and school segregation is now being recognized by the courts. See, e.g., Brewer v. School Board of City of Norfolk, 397 F.2d 37, 41-42 (4th Cir. 1968).

[63] See notes 18-21, supra.

Significantly, Northern courts are ruling that plaintiffs need not bear the entire burden of proving that any challenged segregation results from the purposeful action of public officials. Rather, they are following the approach that once a prima facie case is made that segregation exists, the burden is on the officials to disprove that it was caused by their actions.

Thus, in United States v. School District 151,[64] the court ruled:

> Racial distinctions by public officials are uniquely repugnant to the Constitution. McLaughlin v. Florida, 379 U.S. 184 (1964). Therefore, standards and procedures pursuant to which pupils are assigned to schools, which are alleged to be racially discriminatory and which have resulted in exclusively white student bodies in regular classes in certain of a district's schools alongside almost exclusively Negro student bodies in the district's remaining schools, are subject to the most intensive judicial scrutiny and require the officials responsible to show that the standards and procedures challenged are based upon constitutionally permissible factors. Gomillion v. Lightfoot, 364 U.S. 339, 341-42 (1960); Green v. County Board of Educ., 391 U.S. 431 (1968); Northcross v. Board of Educ. of Memphis, 333 F.2d 661, 664 (6th Cir. 1964); Brewer v. School Board of Norfolk, 397 F.2d 37, 41 (1968); Evans v. Buchanan, 207 F. Supp. 820 (D. Del. 1962); Gatreux v. Chicago Housing Authority, 296 F. Supp. 907 (N.D. Ill. 1969); Chambers v. Hendersonville City Board of Educ., 364 F.2d 189, 192 (4th Cir. 1966) (emphasis added).

Similarly, in Davis v. School Dist. of Pontiac,[65] a federal district court ruled:

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[64] 301 F. Supp. 210 (N.D. Ill. 1969)

[65] Civ. Action No. 32392 (E.D. Mich. 1970).

> In view of the racial imbalance which obviously exists in the faculties of the Pontiac School system, it is incumbent on the defendants herein to prove that such did not result from discriminatory practices on their part. See Chambers v. Hendersonville City Board of Educ., Rolfe v. County Board of Educ. of Lincoln County, Tenn., 391 F.2d 77 (1968).

Shifting the burden does not mean that segregation will be held unconstitutional in all cases. In practice, however, it increases the likelihood that the segregation will be found unconstitutional.[66]

If a voucher plan produced more segregation than the present system, public officials might find it difficult to justify the plan, at least in the absence of reasonable administrative controls on discrimination by participating independent schools. They might well have a more difficult burden justifying such a plan than a neighborhood school system with a long history of acceptance. (Neighborhood schools also have the virtue of convenience.) Again, the prudent course would be to include adequate control over the admissions process of voucher schools such as a requirement that minorities be admitted in proportion to the number of minority applicants in anticipation of justifying a voucher plan to the courts.

4. Summary of the Restrictions Placed on Voucher Programs by the Equal Protection Clause of the Fourteenth Amendment.

To date, the only voucher programs that have been reviewed by the federal courts have arisen in Southern states. It was clear in these cases that the states sought to use vouchers as a way of avoiding their constitutional obligation to desegregate those public schools which had formerly been segregated by law. Not surprisingly the courts have consistently ruled such schemes unconstitutional. A similar ruling would be nearly certain if a Northern state adopted a voucher program as a device to avoid integration or further racial segregation through the use of private schools.

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[66] Other recent cases have found segregation unconstitutional, even if it does not result from official separation of the races, if there is a showing of harm to black pupils in the racially isolated schools. These courts have held such harm is sufficient to prove a denial of equal educational opportunity. See, e.g., Keyes v. School Dist. No. 1, 303 F. Supp. 280 (D. Colo. 1969), 313 F. Supp. 61 (1970); Crawford v. Board of Educ. of Los Angeles County, Civ. Action No. 822854 (Ca. Sup. Ct. 1970).

When there is no evidence of state complicity in discrimination, however, the outcome is not so certain. Nonetheless, the second part of this memorandum concludes that schools which participate in voucher programs will be treated like public schools as far as discrimination is concerned. In other words, voucher schools may no more discriminate on the basis of race than public schools.

The most difficult question remains - what of voucher programs in which neither the state nor the private schools deliberately discriminate on the basis of race, but in which in fact are segregated. The weight of present judicial authority considers the latter segregation constitutional; therefore, a voucher program which involved no discrimination by either the state or the schools would probably be constitutional even if it produced some racial separation between schools.

In practice it might be difficult to determine whether segregation in a voucher program is entirely unintentional, perhaps more difficult than in the case of neighborhood school zoning. Independent schools generally decide on a student-by-student basis whom to admit, whereas public schools generally admit all of an assigned block of students. Voucher programs, which utilize independent schools, would involve student-by-student admission - in short, many decisions in which race may or may not have played a part. Furthermore, school cases to date have dealt only with decisions by public officials (generally school boards); a voucher program by contrast would involve reviewing decisions made by individuals whose status is less clear.

We conclude that courts are likely to reject voucher plans which do not adequately protect against racial discrimination in admissions to voucher schools. We also find that a voucher plan with clear administrative safeguards against discrimination is legally preferable. Requiring that minorities be admitted in proportion to the number of minority applicants is a likely approach.

5. Other Federal Constraints on Segregation.

Section 601 of Title VI of the 1964 Civil Rights Act provides:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

Section 602 authorizes each Federal department and agency administering a program of federal financial assistance to effectuate the non-discrimination ban by regulation and provides as remedies for noncompliance (1) refusal or termination of the assistance; or (2) "any other means authorized by law."

Title VI standards must be met in any demonstration project which includes federal funds. In addition, any other voucher program which receives any federal funds would also have to comply or face possible termination of federal support.

APPENDIX C

REVIEW OF STATE CONSTITUTIONAL PROBLEMS

Section I recommended a number of regulations designed to meet federal constitutional requirements regarding religious freedom and racial discrimination. These federal requirements are discussed in detail in Appendices A and B. But many state constitutions also place limitations on aid to church-related institutions and on the use of public funds for nonpublic schools. This Appendix reviews the requirements in the six states where there has been greatest interest in a demonstration: California, Indiana, New York, Pennsylvania, Washington and Wisconsin. California will be discussed first. The discussion of potential constitutional problems in California is applicable to all the other states considered and will therefore not be repeated in subsequent sections. Instead, these subsequent sections will simply discuss the ways in which other state's constitutional provisions, statutes and decisions either support or weaken the arguments used in discussing California.

State code requirements are beyond the scope of this appendix, as are local administrative rulings. This Appendix, therefore, should not be considered an exhaustive study of state legal barriers. Rather, it should be used as a survey of the major constitutional problems and as a preliminary brief for the constitutionality of the voucher model.

I. California

A. Relevant Constitutional Provisions

Art. 1, Sec. 4

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this State; ... but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of this state.

Art. 9, Sec. 5

A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement.

Art. 9, Sec. 8

No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.

Art. 13, Sec. 21

... no money shall ever be appropriated or drawn from the State Treasury for the ... benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the State as a state institution, nor shall any grant or donation of property ever be made thereto by the State [exceptions are provided for the blind, handicapped, etc.].

Art. 13, Sec. 24

Neither the legislature, nor any county, city and county, township, school district, or other municipal corporation shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed or sectarian purpose, or help to support or sustain any school, college, university, hospital or other institution controlled by any religious creed, church, or sectarian denomination whatever nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided that nothing in this section shall prevent the legislature granting aid pursuant to Sec. 21 of this article.

B. Restrictions on Using Public Funds for Sectarian Institutions

Art. 9, Section 8 prohibits the use of public funds for "the support of any sectarian or denominational school," and Art. 13, Section 24, prohibits the use of public funds "in aid of any religious sect" or "to support or sustain any school ... controlled by any religious creed, church or sectarian denomination."

There are three theories under which sectarian schools might, nonetheless, be included in a California voucher program.

(1) The money goes to parents and not to the schools. Therefore, the money received by the schools is not subject to the restrictions of the state constitution and may be used by the parents to purchase education services at parochial as well as secular schools.

(2) The money is paid to schools selected by parents in exchange for providing educational services of equal value and, as such, does not constitute state "support" of sectarian institutions.

(3) It is a denial of equal protection and due process under the Fourteenth Amendment, and religious freedom under the First Amendment of the U.S. Constitution, to preclude participation in a nonpublic school voucher system to schools that are operated by religious groups.

We will take up these three theories in order.

1. The money involved may be private, not public.

Art. 9, Sec. 8, and Art. 13, Sec. 24 restrict only the use of public money. Therefore, a voucher program which would allocate money directly to students (and their parents) to pay the cost of their education may not be barred. This view is supported by the discussion in Veterans Welfare Board v. Riley, 189 C. 159, 208 P. 678 (1922), where the California Supreme Court upheld the Veterans Educational Act which provided money for (1) tuition (2) transportation, and (3) a $40 month subsistence allowance for veterans enrolling at public or private educational institutions.

Although the court in Riley did not specifically make any reference to the religious restrictions in the state constitution, in a subsequent case involving the relevant portions of the constitution, it relied on Riley, observing that:

> It is true that the sections of the Constitution [restricting expenditures at sectarian institutions] were not cited in [Riley] in either the main or dissenting opinions. Eminent counsel represented the parties in that case, and those counsel as well as the learned members of the Supreme Court must have been familiar with the entire Constituion. The fact that the sections here involved were not considered, especially by the dissentors, would indicate that they were considered no bar to the Veterans Education Act, rather than that they were overlooked in a case of importance. Bowker v. Baker, 167 P.2d 256, 73 C.A.2d 653 (1946).

Support for the private versus "public" money theory may also be found in the case of Bertch v. Social Welfare Department, 289 P.2d 485, 45 C.2d 524 (1955), where the court considered whether it was a violation of religious restrictions on public money to give state old age support to individuals who in turn pledged all of the money to a religious group. The court there held that it was "completely immaterial and irrelevant for what the money was spent, ... if the applicants [were] otherwise qualified for benefits."

Several other state programs also include parochial institutions, presumably because the money, which is directed to institutions on the basis of private, rather than state choice, is not subject to the religious restrictions of the constitution. Thus, the state has established competitive scholarship programs under which students may attend private institutions at the collegiate level (see Chs. 3 and 3.5 [commencing with Secs. 31201 and 31230], respectively, Div. 22, Ed. C.; also see Sec. 4709, Lab. C.). There are fellowships for graduate study (Ch. 316 [commencing with Sec. 31240], Div. 22, Ed. C.) and state guaranteed loan programs (Ch. 4.5 [commencing with Sec. 31271], Div. 22, Ed. C) for students, the funds from which may be used by the student to attend private or parochial institutions.

In the same vein, Section 6871 of the Education Code authorizes a school district, with the approval of the Superintendent of Public Instruction, to pay to the parent or guardian of a physically handicapped minor, for whom special educational facilities and services are not available and cannot be reasonably provided in the local public schools, a specified amount toward tuition in a public or private nonsectarian school offering the necessary facilities and services.

There is support for this rationale implicit in several federal programs as well. The G.I. Bill has long authorized veterans to attend any educational institutions of training selected by them, including sectarian institutions. 72 Stat. 1177 (1958), 38 U.S.C. 1620. Similarly, Congress has authorized payment for its pages to attend the school of their choice, secular or sectarian. 60 Stat. 839 (1946), 2 U.S.C. 88a.

In Quick Bear v. Leupp, 175 U.S. 291 (1899), the Supreme Court held that Indians could purchase educational services from a religious body, even though the funds were supplied by the United States Government under treaty. A state voucher program, similarly, might "entitle" parents to use funds without religious restrictions, just as the treaty entitled the Indians in Quick Bear to do.

2. Money paid for educational services may not unconstitutionally "support" or "sustain" sectarian institutions.

It is clear that aid to nonpublic schools is not automatically prohibited. In Bowker v. Baker, 167 P.2d 256, 72 C.A.2d 653 (1946), bussing of parochial students was specifically upheld. Interestingly, the court relied on the decision in Veterans Welfare Board v. Riley, discussed supra, in reaching its decision. The veterans educational act had specifically authorized aid for transportation. The court in Bowker noted this and held:

> We may take judicial notice that there are numerous denominational schools, colleges and universities in this state. If the direct payment by the state of the transportation costs of the veteran between his home and such an institution of learning, as well as to publicly maintained schools and colleges, is not a violation of the constitutional provisions, then certainly permitting a little child to occupy a vacant seat in a school bus in order that he might attend a denominational school cannot be held to be such a violation.

The Veterans Act also authorized the payment of tuition so by the reasoning of Bertch there would be authority for upholding a voucher plan in which parents chose the school their children attended.

There are two important aspects to this "purchase of education services" theory. First, the amount of aid provided must not exceed the value of the education provided in return. The one exception to this principle is that if schools operated for profit are included, a church school should be as free to make and spend its "profit" without restriction as any other school would be. See Choper, The Establishment Clause and Aid to Parochial Schools, 56 Calif. L. Rev. 260 (1968), who argues that "if any organization - profit or non-profit, religious or sectarian - provides a secular service to government at the 'going rate,' and is able to profit thereby because of low labor costs, efficiencies, or any reason, the Constitution should not be held to prohibit it. In fact, for the government to refuse to deal on equal terms with an organization providing public services because that organization is religiously affiliated might be seen as a violation of the free exercise clause." Id. at 288-89. There are a number of cases in which courts have upheld the use of religious institutions for providing care to needy individuals as long as the funds awarded did not exceed the cost of services provided. See, e.g., Community Council v. Jordan, 102 Ariz. 448, 432 P. 2d 460 (1967); Schade v. Allegheny County Institution District, 386 Pa. 507 (1956); Murrow Indian Orphans Home v. Childers, 197 Okla. 249, 171 P. 2d 600 (1946); Dunn v. Addison Manual Training School, 281 Ill. 352, 117 N.E. 993 (1917); Dunn v. Chicago Industrial Schools, 280 Ill. 613, 117 N.E. 735 (1917); Synod of Dakota v. State, 2 S.D. 366, 50 N.W. 632, 14 L.R.A. 418 (1889); St. Mary's Industrial School for Boys v. Brown, 45 Md. 310 (1876); People ex rel. Roman Catholic Orphan Asylum Soc. v. Board of Education, 13 Barb. (N.Y.) 400 (1851). Contra, State ex rel. Nevada Orphan Asylum v. Hallock, 16 Nev. 373 (1882). Contra, Bennett v. City of La Grange, 153 Ga. 428, 112 S.E. 482 (1922).

There are two approaches which might be taken to the problem of enforcing the secular cost restriction. The first would be to focus on the value of the total services provided. As long as no more funds were provided to a given school than were expended in return on the secular education of children (or retained as profit within permissible levels) it might be argued that the state was not funding religious activities. This approach would be the easiest and least expensive to administer, for it would make it unnecessary for the state to police the day-to-day operations of schools to see which portion of the costs of that day were secular, and which religious. This "total value" approach would also make it less likely that the state would become unconstitutionally entangled in the religious affairs of the church schools in violation of the federal standard announced recently in Walz v. Tax Commission, 90 S.Ct. 1409 (1970). (See Appendix A for a more complete discussion of the Walz decision.)

Alternatively one might try to separate secular and sectarian costs in each and every activity of the school. Not only might this prove an impossible task in theory, but enforcement would be extremely costly and time consuming. Requiring the schools to "split time" each day between religious and secular activities might reduce the enforcement problems somewhat, but might also infringe on religious rights by making it impossible for voucher schools to teach secular subjects in a religious way.

The second critical aspect of the purchase of services theory is that the aid be allocated on the basis of individual choice. Even if a non-profit requirement were enforced, if the schools of only one denomination were allowed to participate, the state would be aiding that denomination to enroll more children and thereby to gain more religious adherents than if no aid were permitted. But if the aid follows a child, regardless of the school he chooses to attend, then the state is merely enhancing private choice in education or religion, not influencing it. This is the policy underlying the "child benefit" doctrine which was adopted in California in the case of Bowker v. Baker, which upheld providing free transportation for school children whether they attended secular or sectarian schools. In Bowker the court noted:

> The direct benefit conferred is to the children only, with only an incidental and immaterial benefit to the private schools, /therefore the/ indirect benefit ... does not violate any constitutional provisions against giving state aid to denominational schools. 73 C.A. 2d at 661.

The "child benefit" doctrine has also been followed in all those instances of aid which have thus far been approved by the U.S. Supreme Court. In Everson v. Board of Education, 330 U.S. 1 (1947), bussing for all students, regardless of the school they attended, was upheld, and in Board of Education of Central District No. 1 v. Allen, 392 U.S. 236 (1968), the loan of textbooks to students was similarly upheld.

Finally, the court may be willing to grant more flexibility in reviewing the constitutionality of parochial school participation for the sake of experimentation. Thus, the court held in California State Employees Association v. Williams, 6 C.A. 3d 554 (1970) that a restrictive provision of the California Constitution "does not prohibit legislative experimentation in new forms to fit new functions." See also Morton v. Board of Education, 69 Ill. App. 2d 38, 43, 216 N.E. 2d 305, 307 (1966), where the Illinois Supreme Court found an implied power to experiment in a statute authorizing the board to maintain the public school system, and therefore allowed a voluntary dual enrollment program to go into effect; Council of Supervisory Ass'ns. v. Board of Education, 23 N.Y. 2d 458, 468, 297 N.Y.S. 2d 547, 555 (1969), where the New York Court of Appeals allowed a board of education to make temporary appointments for experimental purposes without first satisfying state constitutional requirements for competitive examinations; Note, School Decentralization: Legal Paths to Local Control, 57 Georgetown L.J. 992, 999 (1969).

3. The Federal Constitution May Pre-empt the State Constitution

Finally, it may be that a state constitution cannot be more restrictive on the question of parochial school participation in a voucher demonstration than the United States Constitution without violating the federal guarantees of free exercise of religion, due process, or equal protection. In other words, it may be that federal case law under the United States Constitution determines how much as well as how little may be done. A significant case to consider in this connection is Reitman v. Mulkey, 387 U.S. 369 (1967). There the United States Supreme Court struck down, as violative of equal protection of the laws, State Propositon 14, which had attempted to render California's antidiscrimination statute null and void in the area of housing. The best rationale available to justify the Court's result is that it violates equal protection to put a minority, such as blacks, under a special constitutional handicap (i.e., overcoming specific state constitutional inhibitions) when the minority seeks a political result to which it is entitled as a matter of federal constitutional right. Applying this doctrine to vouchers, state constitutional prohibitions (if they were held to preclude tuition grants) might be held to deny parochial school patrons equal protection, because they would put such patrons as a minority in the position of having to overcome special and onerous legal restrictions to procure rights which would be procurable by simple acts of legislation but for the state constitutional restrictions.

Alternatively, it may be argued that the Free Exercise Clause of the United States Constitution prohibits a state constitution from denying students a voucher because of their religious beliefs just as it was held to prevent requiring a Seventh Day Adventist to work on Saturday, in violation of her belief, in order to collect unemployment compensation, in Sherbert v. Verner, 374 U.S. 398 (1963). See also A. Bickel, The Supreme Court and the Idea of Progress, 67 (1970); Drinan, Public Aid to Parochial Schools - A Reply, 75 Case & Comment 13 (1970).

C. Restrictions on Using Public Funds for Non-Public Schools

In addition to the prohibitions on aiding sectarian institutions, the California Constitution also prohibits providing money to nonpublic schools. Art. 9, Section 8 prohibits aid to "any school not under the exclusive control of the officers of the public schools;" and Art. 13, Sec. 21, prohibits money for the "benefit of any institution not under the exclusive management and control of the State."

There are two theories which justify providing aid to voucher schools. First, because the money is disbursed according to private choice, it is "private" not "public" and therefore is exempted from the constitutional restrictions. This line of reasoning has been discussed above with regard to religious restrictions and will not be repeated here.

Alternatively, it may be that schools which participate in a voucher program are subject to state "control" within the meaning of the constitution even though they are operated by private parties. Control, it may be argued, depends for constitutional purposes on regulating relationships between citizens and the aided institution, not on regulating the day to day activities of the institution. In the proposed voucher model, all participating schools would have to agree to admissions controls which would ensure equal access opportunities to all children regardless of income or race. In addition, the state would continue to regulate the secular activities of the schools to ensure they were providing adequate education services. The regulation of minimum quality and of access in the voucher program might therefore fulfill the essential purposes of the control requirement.

Support for this position is found in _California State Employees Association v. Williams_, 6 C.A. 3rd 554 (1970). Although health, not education, was at issue, the Court in _Williams_ held that constitutional restrictions on organizations not under state control did not prohibit the state from using private health organizations to supply health services under the state Medi-Cal program. The Court in _Williams_ focussed primarily on Article XXIV of the

Constitution which prohibits having public services offered by anyone but public employees, but its reasoning applies to other control provisions as well. In the words of the court:

> /A/ constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provisions of the constitutions are consistently expanded and enlarged by construction to meet the advancing affairs of men ....(People v. Western Air Lines, Inc. (1954), 42 Cal. 2d 621, 635)....
>
> When Article XXIV was adopted, the state government was a relatively simple structure. Aside from education and a few subvention programs, state functions were conducted within a relatively self-contained system of agencies. At that very time American governments, federal and state, were on the edge of burgeoning developments. In the ensuing years and decades a multitude of new public services were undertaken. New assumptions of public responsibility were accompanied by significant shifts in the systems and methods of public administration. In part, the new programs were accomplished through the multiplication and expansion of public agencies and staff, in part by innovative techniques of indirect administration. These techniques involved interactions between separate systems, both governmental and private. Public entities now combine vertically and horizontally for the fulfillment of shared objectives. Federal and state grant-in-aid programs engage political subdivisions in a host of cooperative services. States join in interstate compacts and counties and cities in intergovernmental contracts. Government-chartered corporations and autonomous authorities assume a hybrid, public-private character.
>
> Traditional distinctions between public and private action are further obliterated by myriad joint undertakings of governmental and private organizations. The expansion of public agencies evokes counter-pressure for enlarging the role of the 'private sector.' Limited delegations of public power or function to private groups occur with increased frequency. Private activity becomes so intertwined with state policy as to be transmuted into governmental action for the purpose of evoking constitutional safeguards. Commercial and nonprofit research organizations, as well as universities engage in government-sponsored research and development projects. Complex environmental and social problems call for interdisciplinary teams, combining the resources of government,

> industry, science and education. In many areas government confines its role to that of originator, financier, and policy arbiter, leaving direct administration in quasi-private or private hands. Commentators employ the phrase 'government by contract' or 'administration by contract' to describe this phenomenon.
>
> *Viewed within the conceptual framework of these evolutionary developments, the constitutional policy of a merit employment system within the system of state agencies engenders no demand for achieving expansions of state function exclusively through the traditional modes of direct administration. It does not prohibit legislative experimentation in new forms to fit new functions.* It compels expansion of civil service with expansions of state agency structure but does not force expansions of state agency structure to match extensions of state function. To the contrary, the state civil service suffers no displacement and the underlying constitutional policy is not offended when a new state activity is conducted by contract with a separate public or private entity.
> (Emphasis added.)

II. Indiana

A. *Relevant Provisions*

Art. 1, Sec. 6

No money shall be drawn from the treasury, for the benefit of any religious or theological institution.

B. *Commentary*

There is only one state decision in the area of religion and education in Indiana. In *State ex rel. Johnson v. Boyd*, 217 Ind. 348, 28 N.E. (2d) 256, the court held a city could rent extra school space from a parochial school.

In 1967, the Attorney General upheld a law providing bus facilities for children attending nonpublic schools. His rationale involved the "purchase of services" theory. Aside from *Boyd*, his opinion is the only official Indiana discussion of the overlap of religion and education. It is therefore reproduced in full:

> Opinion Requested by House of Representatives, Indiana General Assembly.
>
> This is in response to House Resolution No. 18, requesting an Official Opinion on the constitutionality of House Bill No. 1075.
>
> House Bill No. 1075, commonly referred to as the "Fair Bus Bill," provides:
>
> > In the interest of the safety of the school children of the state, the school bus transportation authorized herein shall also be made available by each school corporation to non-public elementary and secondary school students residing within the confines of the corporation. The transportation thus provided non-public elementary and secondary school students shall be substantially equal to transportation provided public school students in similar circumstances. The governing body of any school corporation transporting said non-public school students residing in their district may purchase necessary equipment or contract for such transporting of non-public school puupils as may be necessary.
>
> The question presented when viewed under the First Amendment to the Constitution of the United States and Art. 1,§6, of the Constitution of Indiana, is neither novel nor profound as a question of constitutional law in American jurisprudence. If anything, it is surprising, in light of the decisions, that the question still has vitality.
>
> The Supreme Court of the United States in Everson v. Board of Education, 330 U.S. 1 (1947), with Justice Black speaking for the Court, held that reimbursement of fares by the school board to parents paying for public transportation for their children attending private schools was not violative of the First Amendment.
>
> Indiana Attorney General James A. Emmert, later a Justice of the Supreme Court of Indiana, joined with the Attorney General of Illinois representing their respective states as amici curiae urging affirmance of the constitutionality of the New Jersey statute in the Everson case because of similar statutes in their respective states.

The Court similarly held that the First Amendment was not violated when the State supplied free textbooks to private schools in Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930). The court reasoned in both the Everson case and the Cochran case that the activities involved were a legitimate use of the general welfare power of the State to provide for the education and safety of the children and of only speculative incidental benefit to the religious organization.

The Everson case clearly disposes of the question under the First Amendment.

We, therefore, turn to the question under the Indiana Constitution. Article 1, §2, 3, 4, 5 and 6 of the Constitution encompass the same principles of freedom of religious practice and state established religions as the First Amendment. While the wording may differ somewhat, the principles of constitutional law applicable to each are identical, particularly in light of the purpose of the provisions in the Indiana constitution. Protective provisions on religion were an essential part of the Bill of Rights of the Indiana Constitution prior to the twentieth century since the Bill of Rights of the Federal Constitution had not been held directly applicable to the States. In Murdock v. Pennsylvania, 319 U.S. 105 (1943), the First Amendment was made directly applicable to the states on a basis equal to its Federal application. The Murdock case, in essence dispensed with the necessity of the same provisions in the State Constitions. Nonetheless, they do exist in Indiana as well as her sister states and do have force and effect in form though not in substance.

The constitutional questions which you pose have been considered in several other states which have followed much the same reasoning as the Everson case in holding the statutes constitutional. Bowker v. Baker, 73 Cal. App. 2d 653, 167 P.2d 256 (1946); Nichols v. Henry, 301 Ky. 434, 191 S.W. 2d 930 (1945); Board of Educ. of Baltimore County v. Wheat, 174 Md. 314, 199 A. 628 (1938); Adams v. County Commrs., 180 Md. 550, 26 A. 2d 377 (1942). Also see Dickman v. School Dist. No. 62, 232 Or. 238, 366 P. 2d 533 (1961); Chance v. Mississippi State Textbook Bd., 190 Miss. 453, 200 So. 706 (1941); Southside Estates Baptist Church v. Board of Trustees, 115 So. 2d 697 (Sup. Ct. Fla. 1959) and Bradfield v. Roberts, 175 U.S. 291 (1899).

The court in Snyder v. Town of Newtown, 147 Conn. 374, 161 A. 2d 770, 778, 779 (1960), in upholding the Connecticut statute under its Constitution said:

> ... It aids the parents in sending their children to a school of their choice, as is their right. It protects the children from the dangers of modern traffic and reduces the hazards of contracting illness in bad weather. It is consistent with the present-day policy of gathering children into modern schools for better educational opportunities. It primarily serves for better public health, safety and welfare and fosters education. In the light of our history and policy, it cannot be said to compel support of any church.

In the most recent decision considering the constitutionality of the "Fair Bus Bill," the Supreme Court of Pennsylvania held that the act did not violate the Pennsylvania Constitution relying upon the reasoning in the Everson case. Rhoades v. School Dist. of Abington Township, 424 Pa. 202, 226 A. 2d 53, 35 Law. Wk. 2415 (1967). Justice Musmanno in referring to the attack on the act under the commonwealth's constitution said that "these assertions are so feeble of merit that they must fall in the slightest breeze of analysis."

A similar view has long existed in Indiana. The Attorney General, on two different occasions in 1936, had the opportunity to consider Acts 1933, ch. 541, Burns IND.STAT.ANN § 28-2805 which provided for bus transportation for children attending private schools residing on or along the regular bus route, which is nearly identical to Acts of 1965, ch. 260, § 901, Burns 28,3943, the Acts being amended by Bill 1075. On neither occasion did the Attorney General consider the constitutional questions, but instead interpreted the act in a somewhat favorable light for the children attending the private schools. 1936 O.A.G., p. 404; 1936 O.A.G., p. 415

Similarly, as previously discussed, Attorney General Emmert filed an amicus curiae brief in the Everson case urging the rule that was adopted by the Court in its opinion. A similar view was reflected by the Supreme Court of Indiana in State ex rel. Johnson v. Boyd, 217 Ind. 348, 28 N.E. 2d 256 (1940).

The public policy that has evolved in Indiana through the Attorneys General and the State Supreme Court is like that in the Everson case favoring validity of statutes or conduct which is in the educational or safety interests of the school children although tinged with an incidental benefit to a religious group.

The reasoning and decision of the Supreme Court in the Everson case is of more than persuasive value since it involves a question of constitutional law nearly identical to the question that you pose. It stands as the cornerstone of the doctrine of constitutional law that State acts or conduct designed for the protection and well being of its youthful citizens will not be struck down on the basis of some incidental quasi religious benefit.

Also, inescapable is the fact that the Indiana statute was directly brought into issue in the Everson case by the amicus curiae appearance of the State of Indiana. The only difference between that Indiana Act and the one under consideration is the fact that the former statute made the providing of free bus transportation to private students discretionary with school officials and the present bill would make it mandatory. This difference is inconsequential.

One of the paramount duties of State government, under our governmental system, is education of the citizens. An equally paramount duty is the safeguarding of citizens from unnecessary hazards, particularly those precipitated by a mechanical and motorized society.

The principle underlining the validity of state statutes providing transportation for private school pupils is that the direct benefit is to the pupil and not the school they attend; and health, welfare and safety measures should be applied to all children regardless of race or religion.

Free bus transportation for pupils attending private schools has existed in Indiana since 1933 without federal or state judicial interference.

It is regrettable that a statute that has reflected the formal public policy of this state for thirty-four years should now precipitate divisive arguments between the citizenry that were peaceably laid to rest so many years ago.

In light of the Everson case and the long public policy of this state the assertions, as Justice Musmanno said, are so feeble of merit as to fall at the slightest breeze of analysis.

The law leads to but one conclusion. It is, therefore, my Opinion that House Bill 1075 is constitutional under the Constitution of the United States and the Constitution of Indiana.

It should be pointed out, however, in closing, that while the Bill is constitutional it is vague in that it does not specify to where or from where the transportation shall be provided. It merely refers to the duty of the school corporation to provide such transportation to students residing within the confines of the corporation. The Bill should specify the route or destination intended to be permissible in providing such transportation so as to avoid confusion and uncertainty in implementing the measure.

III. New York

A. Relevant Provisions

Art. 1, Sec. 3

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state.

Art. 11, Sec. 3

Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.

B. Commentary

Section 3 of Article 11, known as the Blaine Amendment, has been under repeated attack. Both houses of the state this Spring voted in favor of its repeal. But such action cannot become effective until 1972 at the earliest, because it must pass two successive legislatures as well as a referendum. An earlier repeal attempt was rejected by the voters in 1968.

This provision is very restrictive on its face, because it bars indirect as well as direct aid. A special exception for bussing was felt to require an amendment in 1938. Nevertheless, the three arguments suggested for California might apply in New York as well. The provision of books to all students, whether they attended parochial or public schools was, after all, upheld under the New York State Constitution as well. See also Sargent v. Rochester Board of Education, 177 N.Y. 317, 69 N.E. 722 (1904) which allowed payment of the salaries of nuns at a sectarian orphanage where it was clear that they provided strictly secular education services.

IV. Pennsylvania

A. Relevant Provisions

Art. 1, Sec. 3 Religious Freedom

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given to any religious establishment or mode of worship.

Art. 3, Sec. 15 Public school money not available to sectarian schools

No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.

B. Commentary

Bussing of parochial students has been upheld in Pennsylvania. Rhodes v. School District of Abbington Township, 226 A. 2d 53, 424 Pa. 202 (1967) cert. denied 389 U.S. 846. Pennsylvania has also passed a nonpublic school aid program (see Appendix E for a more complete discussion of the program) which authorizes the State Superintendent of Public Instruction to purchase "secular educational services" from nonpublic schools in Pennsylvania. The law further limits the purchases to courses in mathematics, modern foreign languages, physical science, and physical education.

This law was held constitutional under the United States Constitution by a three judge federal district court in Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969). The Supreme Court has noted probable jurisdiction in the case, 90 S. Ct. 1354 (1970), which should be heard this spring.

V. Washington

A. Relevant Provisions

Article I, sec. 11, as amended by Amendment 34 (1958)
(Rev. Code of Wash. Ann., 1966)

... No public money or property shall be appropriated for, or applied to any religious worship, exercise or instruction, or the support of any religious establish....

Article IX, sec. 4 (1889) (Rev. Code of Wash. Ann., 1966)

All school maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

Article XXVI (1899) (Rev. Code of Wash. Ann. 1966)

The following ordinance shall be irrevocable without the consent of the United States and the People of this state: ....

Fourth. Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control which shall be open to all the children of said state.

Article IX, sec. 2 (1889) (Rev. Code of Wash. Ann., 1966)

The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.

Article IX, sec. 3 (1966) (Rev. Code of Wash. Ann. Supp. 1969)

The principal of the common school fund as the same existed on June 30, 1965, shall remain permanent and irreducible.

There is hereby established the common school construction fund to be used exclusively for the purpose of financing the construction of facilities for common schools. The sources of said fund shall be: (1) Those proceeds derived from the sale or appropriation of timber and other crops from school and state lands subsequent to June 30, 1965, other than those granted for specific purposes; (2) the interest accruing on said permanent common school fund from and after July 1, 1967, together with all rentals and other revenues derived therefrom and from lands and other property devoted to the permanent common school fund from and after July 1, 1967; and (3) such other sources as the legislature may direct. The portion of the common school construction fund derived from interest on the permanent common school fund may be used to retire such bonds as may be authorized by law for the purpose of financing the construction of facilities for the common schools.

The interest accruing on the permanent common school fund together with all rentals and other revenues accruing thereto pursuant to subsection (2) of this section during the period after the effective date of this amendment and prior to July 1, 1967, shall be exclusively applied to the current use of the common schools.

To the extent that the moneys in the common school construction fund are in excess of the amount necessary to allow fulfillment of the purpose of said fund, the excess shall be available for deposit to the credit of the permanent common school fund or available for the current use of the common schools, as the legislature may direct.

B. Prohibition Against the Use of Public Funds for Sectarian Purposes

Article 1, Section 11, and Articl IX, Section 4, prohibit the use of public funds for the "support of any religious establishment," and for the support of any school which is subject to "sectarian control or influence." Article XXVI, which is a compact between the United States and the state, entered into when Washington acquired statehood, provides that Washington will establish a system of public schools "free from sectarian control."

The Supreme Court of Washington has held that these provisions are to be construed more strictly than the First Amendment of the United States Constitution. Mitchell v. Consolidated School District No. 201, 17 Wash. 2d 61, 135 P.2d 70 (1943), and Visser v. Nooksack Valley School District, 33 Wash. 2d 699, 207 P.2d 198 (1949). In these cases the court held that 1943 and 1949 laws, both of which attempted to provide transportation for parochial school students, violated the state constitution. The 1949 law was enacted after the decision of the United States Supreme Court in *Everson v. Board of Education*, 330 U.S. 1 (1947), which upheld a similar New Jersey law under the federal constitution. In *Visser v. Nooksack Valley School District*, the Washington Supreme Court made the following comment on the *Everson* decision:

> ... this court ... must respectfully disagree with those portions of the *Everson* majority opinion which might be construed, in the abstract, as stating that transportation, furnished at public expense, to children attending religious schools in not *in support* of such schools.

However, the children to be transported in Washington were attending specific parochial schools. Under a voucher scheme, the State does not know which schools will in fact receive the children, and it has not lost its essential neutrality towards religion.

Whether or not the Washington Supreme Court will be willing to make such a fine distinction is unknown. Certainly the state does not deny children the use of roads or walkways, police or fire protection, even though they may be traveling towards a sectarian school. On the other hand, an outright grant or gift to any sectarian school would certainly be prohibited. Support for the theory that voucher funds are private, not public, and, therefore, are not subject to constitutional restrictions on the use of public funds may be found in the Opinion of the State Attorney General upholding the authority of the state to extend loans or funds to college students. He observed:

> ... the proposal now in question ... contemplates complete, outright grants to the individual students. From this we assume that the grants contemplated are to be designed so as to divest the state of ownership interest in the funds granted. If such is the case, we thereby are no longer within the constitutional prohibitions against the use of public funds for sectarian purposes. O.A.G. 57-58, No. 226, Oct. 31, 1958

If the funds are deemed private funds in the hands of parents, prohibitions against the use of public funds to support sectarian schools do not apply, but the anti-gift provisions of the constitution must still be analyzed. Ordinarily, the courts permit the transfer of public property where the main motive behind the transfer is to achieve a public purpose. For example, in Washington, cash awards to veterans were permitted on the theory that the state had an interest in promoting patriotism by recognizing that soldiers of World War I had been underpaid, and by extending additional payment to them. See Gruen v. State Tax Commission, 35 Wash. 2d 1, 211 P. 2d 651 (1949). The Washington Court seemed to rely chiefly on a "deferred compensation" theory, however, and this case is not clear precedent for the "public purpose" rule.

In addition, under identical prohibitions in other states, local governments have been allowed to provide (apparently free of charge) temporary housing for veterans and their families[1] and public subsidies for housing for low income families.[2] More specifically, in the area of education, the state has been allowed to purchase and distribute textbooks to children despite a state constitutional prohibition against giving public property to individuals.[3] In all of these cases, individuals received something of value from the state, but the primary motive for the transfer was not to aid or favor any particular individual, but to further a public purpose, such as promoting patriotism, averting a housing shortage, disseminating knowledge, or providing for a better educated population. The public purpose and public interest in the matter prevailed, and the state constitutional prohibitions were held to apply only where the transfer actually was to promote a private interest.[4]

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[1] E.g., City of Phoenix v. Superior Court of Maricopa County, 65 Ariz. 139, 175 P. 2d 811 (1947).

[2] E.g., Humphrey v. City of Phoenix, 55 Ariz. 374, 102 P. 2d 82 (1940). The Arizona Constitution specifically forbids the grant "in aid of any individual" to take the form of a subsidy. Ariz. Constitution, Article IX, Section 7 (1912), Arizona Revised Statutes Ann. 1956.

[3] MacMillan Co. v. Clarke, 184 Cal. 491, 499, 194 P. 1030 (1920), commented on in 7 So. Cal. L. Rev. 341 (1934).

As the California court observed when it found that payments for veterans' tuition were not unconstitutional as gifts to individuals:

> Bearing in mind that the burden is primarily upon the state legislature to determine whether or not the purpose served is a public purpose, and whether or not the development of the state requires the extension of educational facilities and the giving of additional opportunities to different types of students, it may safely be said that the question is one for the legislature.[5]

One final observation: the Washington State Constitution specifically excepts local government transfers "for the necessary support of the poor and infirm." This exception was also incorporated into a parallel section relating to state government transfers in State v. Guaranty Trust Co.[6] If this reasoning is followed, the "public purpose" exception appears valid in Washington, for the constitutional provision in question in Guaranty Trust did not contain an express provision relating to support of the poor. In fact, landuage in that case suggests that the Washington Supreme Court has adopted the "public purpose" rule:

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[4] Patrick v. Riley, 209 C. 340, 287 P. 455 (1930).

[5] Veterans Welfare Board v. Riley, supra, 189 Cal. at 168.

[6] State v. Guaranty Trust Co., 20 Wash. 2d 588, 148 P. 2d 323, (1944). At that time, the state provision, which on its face applies only to the extension of state credit, had been extended judicially to include transfers of money or property as well. See Washington State Highway Commission v. Pacific Northwest Bell Telephone Co., 59 Wash. 2d 216, 376 P. 2d 605, (1961).

> While it might be urged with much force that, as a matter of strict constitutional construction, state funds cannot be used to aid needy persons, and that this must be done, if at all, by the enumerated political subdivisions of the state, yet we did not make such distinction in the Morgan case, but seemingly adopted the view that the 'recognized public governmental fuunctions' applied to the state in its sovereign capacity as well as to its political subdivisions ....

The anti-gift provisions, in addition, should not bar a voucher program which is purchasing a public service. Thus, state and local governments have traditionally been allowed to make transfer payments on this basis, including compensation for employees,[7] pension payments,[8] and the like.

School districts usually contract with private organizations for construction of facilities, and they also frequently contract for janitorial services, cafeteria services, insurance, and the like. Challenges to payments from the school district to the contractor are extremely rare, and where made, quickly rejected.[9] In keeping with this tradition, the Washington legislature has expressly authorized school district in this state to contract for research and informational services from public universities, colleges and other public bodies.[10]

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[7] Christie v. Port of Olympia, 27 Wash. 2d 534, 179 P. 2d 294 (1947).

[8] Luders v. Spokane, 57 Wash. 2d 162, 356 P. 2d 331 (1960); Bakenhus v. Seattle, 48 Wash. 2d 695, 296 P. 2d 536 (1956); Ayers v. Tacoma, 6 Wash. 2d 545, 108 P. 2d 348 (1940); Yeazell v. Copins, 98 Ariz. 109, 402 P. 2d 541 (1965) (under a similar constitutional prohibition.)

[9] See, e.g., State v. Northwestern Mut. Ins. Co., 86 Ariz. 50, 340 P. 2d 200 (1959).

[10] Rev.Code of Washington, Ann. Sec. 28A.58.530 (1969) (pamphlet supplement 1970).

C. Restrictions on the Common School Fund and Proceeds on the State Tax for the Common Schools

Article IX, Section 2, and Article IX, Section 3 (Amendment 43) provide that the revenues from the "common school fund and the state tax for common schools shall be exclusively applied to" the support and current use of the common schools. Article IX, Section 3, also creates a common school construction fund "to be used exclusively for the purpose of financing the construction of facilities for common schools." This section also itemizes the resources that are to be set aside for the common school fund - the proceeds from the sale or use of certain real properties; five percent of the sale of public lands; and money appropriated by the legislature for the fund.

Whether or not the common school funds are available for use in voucher schools operated by anyone other than the school district would depend on whether or not these schools are "common schools." A recent statutory definition of common schools is found in the Revised Code of Wash., Sec. 28A.01.060 (1969) which reads as follows:

> "Common Schools" means schools maintained at public expense in each school district and carrying on a program from kindergarten through the twelfth grade or any part thereof including vocational educational courses otherwise permitted by law.

Voucher schools, whether operated by the school board or by a private organization, seem to fit within this definition.

A more stringent judicial definition was provided earlier in School District No. 20 v. Bryan, 51 Wash. 498, 99 P. 28 (1909), where the court held that:

> ... a common school, within the meaning of our constitution, is one that is common to all children of proper age and capacity, free, and subject to and under the control of the qualified voters of the school district. The complete control of the schools is a most important feature, for it carries with it the right of the voters, through their chosen agents, to select qualified teachers, with powers to discharge

> them if they are incompetent. Under the system proposed, instead of the voters employing a teacher with proper vouchers of worthiness, they are made recruiting officers to meet a draft for material that the apprentice may be employed.

Applying this definition, the court held that, a model school for training, operated by a normal school, was not a "common school." This school admitted pupils for teacher training purposes, and the principal of the normal school could refuse to accept pupils. In a subsequent case, State ex. rel. School District No. 3 v. Preston, 79 Wash. 286, 140 P. 350 (1914), the state superintendent of public instruction allowed the normal school an apportionment for children in two classrooms; teachers there were employed and paid by the local school district. The state, on behalf of the county school district, sought funds for the rest of the children. The lower court denied the petition and the Washington Supreme Court affirmed, holding that under the facts presented, the normal school was no more a "common school" than was the school in the Bryan case. In State v. Preston the normal school trustees continued to select the personnel for the model training school. Although directors of the school district had power to fire staff, the court deemed this insufficient to distinguish it from the earlier case.

In Sheldon v. Purdy, 17 Wash. 135, 49 P. 228 (1897), where the court refused to make the common school fund and the revenue from the state tax for common schools (although levied by the county commissioner under state mandate) available to pay the interest on overdue school construction bonds; and in State Board for Vocational Education v. Yelle, 199 Wash. 312, 91 P. 2d 573 (1939), the court refused to permit the use of the "common school fund" for a state vocational education program.

Participating voucher schools operated by private organizations could be considered "common schools" under two theories:

1) The statutory definition supercedes the case law definitions; or
2) The program would be arranged so that voter "control" is

established through the Education Voucher Agency.

In any case, whether or not the participating nonpublic schools are "common schools" only determines the availability of the funds set aside for common schools. The legislature could always appropriate sufficient funds for the nonpublic voucher schools out of the general fund.

VI. Wisconsin

A. Relevant Provisions

Art. 1, Sec. 18

> The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

Art. 10, Sec. 2

> The proceeds of all lands that have been or hereafter may be granted by the United States to this state for educational purposes (except the lands heretofore granted for the purposes of a university) and all moneys and the clear proceeds of all property that may accrue to the state by forfeiture or escheat, and all moneys which may be paid as an equivalent for exemption from military duty; and the clear proceeds of all fines collected in the several counties for any breach of the penal laws, and all moneys arising from any grant to the state where the purposes of such grant are not specified, and ... all other revenues derived from school lands shall be exclusively applied to the following objects, to wit:
>
> 1. To the support and maintenance of common schools, in each school district, and the purchase of suitable libraries and apparatus therefor.
>
> 2. The residue shall be appropriated to the support and maintenance of academies and normal schools, and suitable libraries and apparatus therefor.

B. Commentary

The Wisconsin Supreme Court, although acknowledging that Art. I, § 18, historically was more restrictive than the religion clauses of the First Amendment, has held that it would apply the same "primary purpose and effect" test used in Schempp and Allen to issues arising under the section. State ex rel. Warren v. Reuter, 44 Wis. 2d 201, 226 (1969). This may signal a shift from previous decisions of the court in which the section was construed very restrictively. In State ex rel. Weiss v. District Board 76 Wis. 177 (1890), for example, the court stated the historical justification for a narrow reading of the provision:

> Wisconsin, as one of the later states admitted into the Union, having before it the experience of others, and probably in view of its heterogeneous population, ... has, in her organic law, probably furnished a more complete bar to any preference for, or discrimination against, any religious sect, organization, or society than any other state in the Union. Id. at 207.

Similarly, in State ex rel. Reynolds v. Nusbaum, 17 Wis. 2d 148 (1962), the court had held bussing of parochial students to be unconstitutional, despite the Everson decision. The Wisconsin court specifically refused to follow Bowker v. Baker, the California bussing decision discussed above.

One possible explanation for the rejection of bussing in Wisconsin is that some apparently neutral funding programs may nonetheless effectively deny certain children religious freedom. If all private schools charge tuition, for example, bussing children to such schools means that the state is favoring the religious interests of only those children who can afford private schools.

This concern was demonstrated clearly in the concurring opinion of Justice Cassaday in State ex rel. Weiss v. Dist. Board of of School District No. 8, 44 N.W. 967 (1890), in which the court held that bible reading in public schools infringed the Wisconsin constitution. He stated:

> Under our statutes the children of the relators, between certain ages, were bound to attend some public or private school for a certain period each year.... In the case of a poor man incapable of educating his children at private expense, they are "compelled to attend" such school without the consent of themselves or their parents. Notwithstanding it is, in a limited sense, a place of worship; and in the case of men of no property it might impose an unauthorized burden. This, as we understand, is prohibited by the claims of the Constitution we are considering. Id. at 980.

A voucher program which gave money only to schools which did not discriminate against poor children (i.e., schools which either charged no tuition in excess of the vouucher amount, or admitted students without regard to income and provided scholarships to those who could not afford tuition charges) would make religious schools as available to the poor as to the rich. If similar safeguards were included to prevent participating non-public schools from discriminating on the basis of race or sex as well, a voucher program might be seen as consistent with the Wisconsin constitution.

There are two sources of support for this permissive interpretation of the Wisconsin constitution.

First, a 1964 Opinion of the Attorney General upheld an arrangement which allowed students to attend public schools on a part time basis. 1964 O.A.G. 6.187. The rationale is notable for it's concern with protecting the quality of education available to all students in the face of procedural objections to the proposed programs.

> The legislature in conferring on school district boards the broad, express powers above mentioned, with all those necessarily implied thereby, assuredly intended those powers, express and implied, to be exercised wisely and well in the best interests of all the children of Wisconsin, to provide them with the best education possible. It is manifestly unnecessary in these days of recurring crises for our nation,

at home and abroad, to belabor the fact that our republic needs - and will continue to need - well educated men and women of many skills and professions to assure its very existence. Ours is a pluralistic society, drawing much of its vast strength from that fact. If a Wisconsin child, whose attendance at a private school is one of the evidences of the pluralistic character of our society, may by part-time attendance at a public school receive there certain valuable schooling, some of it unavailable in his private school, then he has been benefitted by such schooling, and our state and nation have benefitted as well. The founding fathers of Wisconsin, who held education for all the children of this state in the highest regard, could only take comfort and pride in such a result. "Education, and that of a nature which reaches the boys and girls in every quarter of the state, - common school education, was one of the most cherished thoughts of the constitutional convention."
State ex rel. Owen v. Donald, (1915) 160 Wis. 21, 95.

If district school boards open their schools for part-time attendance by children in private schools in their respective districts, doing so under the above-described authority, and in such a manner that the efficient operation of the district schools is not adversely affected, then such school board action following progressive Wisconsin traditions in the field of education will assist in writing another bright chapter in the already distinguished history of the schooling of our children in this state. The source of its refulgence will be no secret - the benefits conferred through a well-ordered combination of public and private schooling on children, and indirectly on our state and nation. Such chapter - its writing already commenced in certain public schools of this state where such part-time attendance has been permitted - provides further proof, though no more is needed, of the power of our great public school system to do that which it was intended to do - educate Wisconsin children - all of them if need be - and educate them well. It is a system aptly described in the words of a Pennsylvania court with reference to the school system of that commonwealth - a system "created and devised for the elevation of our citizenship as a whole."
Com ex rel. Wehrle v. Plummer and Baish, (1912) 21 Pa. District Reports 182, 185.

Secondly, in Reuter, the most recent Wisconsin decision involving church state issues, the court demonstrated support for the view that some traditional functions of government are better provided when private suppliers are also engaged:

> While the respondent states the government may appropriate money to reimburse a private corporation for expenditures incurred by it in accomplishing specified public purposes, he argues such an appropriation is invalid when paid to or through a private corporation which is not under proper government control and supervision. This proposition is undoubtedly true but, what is proper governmental control and supervision as used in State ex rel. Wisconsin Dev. Authority v. Dammann, supra? This court stated in Wisconsin Industrial School for Girls v. Clark County (1899), 103 Wis. 651, 79 N.W. 422, in considering the propriety of the use of a private corporation at public expense for the care and maintenance of needy children that the test to be applied was whether such agency was "under reasonable regulations for control and accountability to secure public interests." The respondent argues, relying on State ex rel. American Legion 1941, Convention Corporation of Milwaukee v. Smith (1940), 235 Wis. 443, at p. 462, 293 N.W. 161, that there should be auditing safeguards before any expenses are incurred by such agency. It is also argued that Wisconsin Kelley Institute Co.v. Milwaukee Co. (1897), 95 Wis. 153, 70 N.W. 68, 36 L.R.A. 55, requires a private agency to be "controlled and managed by the state. In Whipple the appropriation was struck down as unconstitutional, partly because no control or supervision existed in the town or taxpayers by way of postaudits, voice in management, and in other respects.
>
> The question of reasonable regulations for control and accountability to secure the public interest is one of degree and depends upon the purposes, the agency and the surrounding circumstances. Only such control and accountability as is reasonably necessary under the circumstances to attain the public purpose is required. Budgeting and auditing are,of course, basic and necessary controls; additional types of control vary with the demands or requirements of the circumstances. What would be sufficient control for daily operations

may not serve for capital improvements and vice versa. What controls may be necessary for an agency to be formed may not be necessary for an agency which has been operating for many years and has established an acceptable policy and is under regulations and control of other governmental bodies. Likewise, controls which are sufficient today for this appropriation may not be sufficient under different circumstances.

A private agency cannot and should not be controlled as two-fistedly as a governmental agency. If such need for control is present, it might be better to use a governmental agency. A private agency is selected to aid the government because it can perform the service as well or better than the government. We should not bog down private agencies with unnecessary governmental control.

The insistence upon legal control of the school by the state would be the death of the independent and private agencies aiding the government in its welfare programs and would require all agencies to be in effect state agencies. The concept of a republican form of government does not require that all public health must directly be effectuated at a government office. It is only when the difficulty which individuals have in providing for themselves is insurmountable that the government should step in; but that step should be no more than is necessary and should not supplant private agencies if such agencies can be used as a means to attain the public purpose. (Emphasis added.)

While not conclusive or even authoritative but rather as illustrative, the legislature has in the past made appropriation to private organizations to attain stated public goals with no more and perhaps less control than Chapter 3, Laws of 1969. For instance, sec. 45.40, Stats., authorizes the transfer of $50,000 to the American Legion for the purpose of purchasing and maintaining a camp for disabled veterans and their dependents. Chapter 51, Laws of 1967, appropriated $50,000 to the American Legion to defray the expenses of holding their national convention in Milwaukee. Section 51.38 (4). Stats., provides for state aids to nonprofit corporations operating day-care centers for mentally handicapped. State aids are provided for commitments to private tuberculosis sanitoriums and private insance asylums by secs. 58.06 (2) and 58.05 (2), and 50.04, Stats. Scholarship grants are provided in secs. 39.30 and 39.31, Stats., to aid Wisconsin residents in attending nonprofit public or private institutions of higher education in Wisconsin, some of which institutions are sectarian.

Other states have also used private institutions to attain a public purpose. We recognize that the out-of-state cases may be construing different constitutional language, but they are interesting in evaluating what is the legitimate relationship between government and private agencies to attain public purposes. In respect to hospitals, the following courts have upheld the constitutionality of laws or other enactments subsidizing private agencies to carry on a public purpose. Truitt v. Board of Public Works (1966), 243 Md. 375, 221 A. 2d 370; Lien v. City of Ketchikan (1963), Alaska, 383 P. 2d 721; Abernathy v. City of Irvine (Ky. 1962), 355 S.W. 2d 159; Kentucky Building Commission v. Effron (1949), 310 Ky. 355, 220 S.W. 2d 836; Lazarus v. Board of Commrs. of Hamilton County (1966), 6 Ohio Misc. 254, 217 N.E. 2d 883. We think the basic concern of these courts in using the public, private or sectarian institutions, was a recognition of health as a public purpose and of the institution as a proper means of attaining the purpose.

School buildings and nursing education have also been the subject of approval. Horace Mann League of United States of America, Inc. v. Board of Public Works (1966), 242 Md. 645, 220 A. 2d 51, and Opinion of the Justices (1965), 99 N.H. 519, 113 A. 2d 114. The care and education of orphans, delinquents, and the elderly, is easily accepted as a public purpose and as requiring private agencies as proper means, especially in respect to the elderly. Grants in aid for these purposes to private institutions have been considered as fostering a public purpose without the requirement of very much control of supervision to see how the aid is spent. The operation and reputation of the institution seem to be sufficient. Dunn v. Addison Manual Training School (1917), 281 Ill. 352, 117 N.E. 993; Murrow Indian Orphans Home v. Childers (1946), 197 Okl. 249, 171 P. 2d 600; Schade v. Allegheny Co. Institution Dist. (1956), 386 Pa. 567, 126 A. 2d 911; Community Council v. Jordan (1967), 102 Ariz. 448, 432 P. 2d 460.

> At least five states now provide support to 16 non-medical or about one third of the nonstate operated schools. Florida subsidizes the University of Miami to the extent of $4,500 per student who is a resident of Florida. Pennsylvania, in effect, pays the deficit of Temple University, the University of Pittsburgh, and the Pennsylvania State University, and pays a subsidy on a base of $3,900 per student to Hahnemann Medical College of Philadelphia, Jefferson Medical College of Philadelphia, the University of Pennsylvania School of Medicine, the Woman's Medical College of Pennsylvania. North Carolina grants a subsidy of $2,500 for each student who is a resident of that state to Duke University School of Medicine and Bowman Gray School of Medicine of Wake Forest University. Ohio grants a subsidy of about $4,900 per student to Case Western Reserve University School of Medicien. The state of New York subsidizes all private colleges and universities. The average for a doctor's degree is about $2,000. There are six private medical schools in New York: Albany Medical College of Union University, Columbia University College of Physicians and Surgeons, Albert Einstein College of Medicine of Yeshiva University, New York Medical College, New York University School of Medicine, and the University of Rochester School of Medicine and Dentistry.

Even if the purchase of services approach is rejected in Wisconsin, another way to overcome state constitutional barriers to aid to "sectarian" instituutions was embodied in Reuter. The court argued that an institution may not be considered "sectarian" for state constitutional purposes if it is "controlled" by a secular body.

> It may be assumed that Marquette University is a religious or sectarian institution, but there is no factual basis for concluding that the medical school, as now organized, is a religious institution, regardless of what tests might be used for such a determination. Marquette School of Medicine is a nonprofit corporation organized under chapter 181, Stats. Any association with Marquette University was eliminated in September 1967. While it retains the name "Marquette," it has dropped the word

"University" and has ceased to operate as a department of the university. Also eliminated in its articles of incorporation were the requirements that the medical school be operated in harmony with the fundamental, ethical and educational principles established by Marquette University. The president of Marquette University no longer appoints the faculty of the medical school and the university has no power to discharge any member of the medical faculty. Also eliminated is the provision that assets of the medical school would revert to Marquette University upon dissolution. The articles now provide that these assets will revert to an organization consistent with the purposes for which the medical school is now organized and in accordance with ch. 181.

All reference to Marquette University has been eliminated in the medical school's articles and the school is now empowered to establish its own standards and award degrees. The board of directors no longer consists of any persons connected with Marquette University. Of its 16 members seven are Protestant, five are Catholic, and three are Jewish. Of its faculty, four of its six deans are Protestant, one is Catholic, and one is Greek Orthodox. Nine of the 17 department heads are Protestant, three are Catholic, three are Jewish, and two are not affiliated with an organized religion. Fifty-one percent of the 279 full-time faculty members are Protestant, 33 percent are Catholic and 16 percent are Jewish. The student's religion or lack of it is unknown to the admission committee of the school. Religion is not taught in the medical school but various ethical creeds and religious faiths are considered in seminars in relation to the practice of medicine. This is not a study of religion but even if it were so considered, the constitutions were not intended to prohibit the academic study of religion. See Katz, Religious Studies in State Universities, 1966 Wis. L. Rev. 297. The purpose of the medical school is to teach medicine.

Thus when we consider stated purposes and practices, the make up of its governing board, faculty and student body, the content of its teachings, and its relationship with a religious organization, as relevant factors, Marquette School of Medicine is nonsectarian. These factors, while not exclusive, have legal significance in determining the nature of an institution. See Horace

Mann League of United States of America, Inc. v. Board of Public Works (1966), 242 Md. 645, 220 Atl. 2d 51.

The court noted that even if joint secular control is proven, some might object to incidental benefits to religion. The court overcame this objection first by adapting the Schempp-Allen test as has been noted. It distinguished Nusbaum, the Wisconsin bussing decision, on the grounds that school bus service was not "an educational objective." In Reuter, by contrast, the court found that the primary effect of aid to the medical school was "not the advancement of religion but the advancement of health," and thus that the program was permissible.

Aid to the secular education of children is certainly an "educational objective." See Allen v. Board of Education 392 U.S. 236 (1968). Therefore, by the rationale of Reuter, a voucher program which provided aid to schools under joint secular control would be permissible.

This means, however, that it might be necessary for church related schools to become separate secular corporations in order to secure vouchers in Wisconsin.

APPENDIX D

A MODEL VOUCHER DEMONSTRATION STATUTE

The review of state constitutional provisions indicates that enabling legislation will probably be necessary:

(1) to authorize the EVA to disburse funds to nonpublic as well as public schools

(2) to ensure that state and local funds which are normally based on average daily attendance in public schools are maintained during the demonstration period.

A model statute has been drafted to conform to the California Constitution and Code. This model statute follows the general outlines of legislation approved by the Assembly Education committee in 1970, but differs from that legislation in certain particulars. Many of its provisions could be readily adopted in other states as well.

This statute was drafted to authorize only a demonstration project. In order to leave the demonstration board flexibility in developing the best regulations to fulfill the standards established in Section I, the legislation is quite permissive. If a legislature were to adopt a voucher plan for an entire state, however, more regulations should be included in the authorizing statute. It would be necessary,for example, to spell out more detailed procedures for preventing racial discrimination. In some jurisdictions it might also be desirable to include explicit provisions for judicial review of the EVA's decisions.

The Elementary Demonstration
Scholarship Act of 1970

Article 1. General Provisions

31175. This chapter shall be known and may be cited as the Elementary Demonstration Scholarship Act of 1970.

The Legislature finds that the existing system of state, local and federal financial support for public education, which provides for payments to schools rather than to students, limits the range of educational opportunity available to the vast majority of students and discriminates against economically disadvantaged children whose parents cannot afford to pay for private schooling.

The Legislature further finds that the public welfare will best be served by providing, on a demonstration basis, greater diversity in educational opportunity by providing elementary school children with scholarships for secular education at schools of their parents' choice, whether public or private.

Therefore, it is the intent of the Legislature to enable one or more school districts in the State of California to participate in a federal demonstration program designed to develop and test the use of education scholarships for elementary school children.

The purpose of the Elementary Demonstration Scholarship Program is to develop and test scholarship programs as a way to improve the quality of education by increasing the level of academic achievement of the pupils involved by making schools, both public and private, more responsive to the needs for children and parents, to provide greater parental choice, and to determine the extent to which the quality and delivery of educational services are affected by market competition. The demonstration scholarship program authorized by this act shall aid students and shall not be used to support or to benefit any particular school.

31176. As used in this chapter:

(a) "Local board" means the school district governing board contracting with a federal agency to administer a demonstration program.

(b) "Demonstration board" means the local board or another suitable board designated by the contracting federal agency and approved by the local board. In the event the local board approves a board other than itself to act as the demonstration board, the demonstration board shall have no fewer members than the local board and no more than twice the membership of the local board and shall be representative of the population of the participating district.

(c) "Elementary Demonstration Scholarship Program" means a program for developing and testing the use of education scholarships for elementary school children.

(d) "Demonstration area" means the area designated by the local board for the purposes of a demonstration program. The demonstration area may include the whole or a part of any school district, or a combination of districts or parts of districts.

Article 2. Establishment and Administration of Demonstration Programs

31180. There is hereby established the Elementary Demonstration Scholarship Program, to exist for a period of eight years commencing upon the effective date of this section.

31181. A school district governing board, or combination of school district governing boards, may contract with federal agencies for funds to establish an Elementary Demonstration Scholarship Program.

31182. The demonstration board shall control and administer the demonstration program, and shall adopt rules and regulations for the efficient administration of the demonstration program. These rules and regulations shall provide for the following:

(a) The school of attendance shall certify in writing that the scholarship recipient was regularly enrolled on the fourth Friday after commencement of the semester or quarter, as the case may be.

(b) The dissemination of comprehensive information on all eligible schools, as defined in section 31185, to resident parents in the demonstration area and the provision of an outreach program to advise all eligible residents of the opportunities available to them under the provisions of this chapter.

31183. The demonstration board shall award a scholarship to each elementary school child residing in the demonstration area, subject only to such age and grade restrictions as it may establish.

The scholarship funds shall be made available to the parents or legal guardian of a scholarship recipient in the form of a voucher, drawing right, certificate, or other document which may not be redeemed except for the educational purposes set forth in Section 31175 and at a school which satisfied the requirements of Sections 31185 and 31186.

31184. The demonstration board shall establish the amount of the scholarship in a fair and impartial manner, as follows:

(a) In establishing the amount of the scholarship, special needs of underprivileged or handicapped children who would benefit from special services and compensatory education may be taken into account.

(b) The scholarships shall be adequate to pay for the full tuition of the scholarship recipient in two or more schools in the demonstration area.

31185. The demonstration board shall authorize the parents or legal guardian of scholarship recipients to use the demonstration scholarships at any school in which the scholarship recipient is enrolled which also:

(a) Meets all educational, fiscal, health and safety standards required by law.

(b) Does not discriminate against the admission of students and the hiring of teachers on the basis of race, color, national origin, or economic status, and has filed a certificate with the State Board of Education that the school is in compliance with Title VI of the Civil Rights Acts of 1964 (Public Law 88-352).

(c) Meets any additional restrictions established by the terms of the federal demonstration contract.

(d) Is not controlled by any religious creed, church or sectarian denomination except as provided in Section 31186.

(e) Provides public access to all financial and administrative records.

(f) Provides periodic reports on the progress of the pupils enrolled as determined by standardized tests, including the administration and reporting of any statewide examinations required by law for the public elementary schools of California.

31186. In compliance with the constitutional guarantee of free exercise and enjoyment of religious profession and worship, without discrimination or preference, schools may be exempted from subdivision (d) of Section 31185 if they meet all other requirements for eligibility.

31187. The local board establishing a demonstration program may waive all restrictive or limiting provisions of this code /the State Education Code of California/ for the public schools in the demonstration area, where such provisions relate to the following subjects:

(a) Employment and duties of certificated employees.

(b) Class size.

(c) Contracting.

(d) Salary schedules.

(e) Curriculum.

(f) Certification requirements.

(g) Minimum schoolday.

(h) Percentage of current expense of education for teachers' salaries.

(i) Teacher aides and teacher assistants. No statutory financial penalties shall be assessed during the period of the demonstration which are associated with those sections of the Education Code which may be waived by the local board for the purposes of the demonstration.

31188. The demonstration board may:

(a) Employ a staff for the demonstration board.

(b) Receive and expend funds to support the demonstration board and scholarships for children in the demonstration area.

(c) Contract with other government agencies and private persons or organizations to provide or receive services, supplies, facilities, and equipment.

(d) Determine rules and regulations for use of scholarships in the demonstration area.

(e) Adopt rules and regulations for its own government.

Article 3. Attendance

31190. For purposes of state and local financial support, the superintendent of Public Instruction and local officials responsible for the allocation of funds to schools in the demonstration area shall compute the average daily attendance in the demonstration area as follows:

(a) The average daily attendance in the public schools in the demonstration area for the year immediately preceding the demonstration shall be determined; and

(b) The rate of change in average daily attendance in the demonstration area shall be calculated as the average percentage increase or decrease in public school average daily attendance in the demonstration area for the five years immediately preceding the demonstration; and

(c) The average percentage change as determined in subdivision (b), shall be multiplied by the average daily attendance as determined in subdivision (a), to identify any change in the number of students.

(d) Any change in the number of students identified in subdivision (c) shall be added to or subtracted from the number of students in average daily attendance as determined in subdivision (a). This number shall be declared to be the average daily attendance for purposes of state and local support.

(e) For the second, and each subsequent year of the demonstration project, the number of students in average daily attendance shall be determined by multiplying the rate of change in average daily attendance as determined in subdivision (b) by the number of students determined to be in average daily attendance in the immediately preceding year to determine the total number of students in average daily attendance.

31191. The local board shall receive all state, local, and federal funds allocable to the demonstration area, and shall transfer these funds to the demonstration board if the demonstration board and the local board are not the same. The demonstration board shall use these funds for the demonstration program as provided in this chapter and the terms of the demonstration contract.

31192. The provisions of this chapter shall be liberally construed with a view to effect its objects and promote its purposes.

31193. If any section, suubdivision, sentence, clause or phrase of this chapter is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this chapter. The Legislature hereby declares that it would have enacted this chapter and each section, subdivision, sentence, clause or phrase thereof, irrespective of the fact that any one or more of the sections, subdivisions, sentences, clauses or phrases be declared unconstitutional.

APPENDIX E

SUMMARIES OF EXISTING AND PROPOSED STATE AID TO NON-PUBLIC SCHOOLS

To supplement the discussion of state aid to non-public schools contained in Chapter 4, summaries of the legislation there discussed have been prepared.

Summaries are presented first for the six states which have enacted such legislation, and then for six which have aid proposals pending.

Laws

Connecticut . . . . Page 318
Hawaii . . . . Page 321
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Ohio . . . . Page 323
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Bills

California . . . . Page 330
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Wisconsin . . . . Page 337

A brief summary of the present court challenges to this legislation concludes the appendix.

Connecticut

Public Act #791
Effective July 1, 1969

Payment

The Act appropriates $6 million for the purchase of secular educational services by contract between the Secretary of the State Board of Education and non-public schools. Salaries and textbooks are covered. The basic figure is 20% of a lay teacher's salary reduced by the proportion of time the teacher spends on administrative duties. Textbook aid is limited to $10/year for students in grades 1-8 and $15/year for students in grades 9-12. For the purposes of applying the percentage figures, "salary" means actual base amount without benefits; and it cannot exceed the "average minimum salaries in the state" for public school teachers with comparable degrees.

The number of teachers who are reimbursable under the plan is limited to one for each 25 pupils in the non-public school.

If the non-public school has an enrollment of one-third "educationally deprived children" as defined in section 10-266a of the general statutes, the percentage reimbursement rises to 50%. If there is a 2/3 enrollment the figure is 60%.

In case there are insufficient funds appropriated for claims under the act, an order of payment is established (sect.22) as follows: up to 2% for administration, textbook reimbursements, up to $1 million for increased percentages for disadvantaged children, remaining claims in pro rata shares.

Secular Education Restrictions

Secular education is limited to "any course which is presented in the curricula of the public schools of this state . . . . if the textbooks used for such course are the same" as those used in the public school in the last five years or are approved by the State Secretary of Public Education. The manner of teaching may not "indoctrinate, promote, or prefer any religion or denominational tenets or doctrine." (sec. 3f). Reimbursed teachers cannot spend any time teaching religious subjects (sec. 7). The school cannot train clergy (sec. 12e).

Other Restrictions

1. Teachers who are reimbursed must be certified by the State Board of Education, except that for the first three years of the Act teachers who were employed full time on July 1, 1969, are considered certified.
2. Textbooks must meet the same standards as the public school's texts in addition to meeting secular requirements.
3. The non-public school must be approved by the State Secretary of Public Education as complying with the Act and as complying with "good educational standards" and "meeting adequate safety, sanitary, and construction requirements." (sec. 12). The regulations make these educational standards the same as those applying to the public schools under sec. 10-220 of the general statutes.
4. The school must be non-profit (sec. 12b).

5. The school must file a certificate of compliance with Title VI of the Civil Rights Act of 1964 (P. L. 88-352).
6. The school receiving aid must have a policy of open enrollment, which is defined as "the offer by a school of the opportunity of admission to any qualified student meeting its academic and other reasonable admissions requirements, . . . Without regard for race, religion, creed or national origin, " (see sec. 3h and 12d). Academic requirements may not be such as to result in discrimination by race, etc. (regs. s.10-281n-7 (d)). However, the non-public school may give preference to the children of regular contributors as long as it maintains open enrollment in the same proportion as the aid bears to total operating cost of the school (sec. 12d).
7. The school receiving aid must be in operation prior to July 1, 1969, or it must file a statement of intent to operate a school three years before applying for aid.
8. The Secretary of the State Board of Education can require that records and information (including test scores) be supplied by the school.

Other Provisions

The act provides a detailed notice and hearing system for schools which feel they have been unfairly denied aid or whose aid is suspended. These extensive provisions appear in Section 14 of the act.

Guidelines

For temporary guidelines see: "Proposed Regulations Under Non-Public School Secular Education Act (sec. 10-281a-1)".

Hawaii

Haw. Rev. Laws § 235-57 (1969)

Payment

The statute provides a simple tax credit for students attending grades K-12. The credit is against the individual's net income tax liability, and provides that if the credit exceeds the liability the difference shall be refunded to the taxpayer:

Adjusted Gross Income Brackets	Tax Credits Per Exemption Attending: K-12	An Institution of Higher Education
Under $3,000	$20	$50
$3,000 to $3,999	15	30
$4,000 to $4,999	10	20
$5,000 to $5,999	5	10
$6,000 to $6,999	2	5

Michigan

Mich. Laws Ann. § 388-665-.676(A) (1970)

Payment

The first chapter of this law includes some complicated formulae for equalizing aid distribution throughout the state by means of a "need index."

The aid to non-public schools chapter (2) provides approximately 2% of the total state and local public school expenditures (less amounts spent on transportation and auxiliary services for non-public schools) for the purchase of secular services. In 1970-71 and 1971-72, the State Superintendent of Education would pay not more than 50% of the salaries of certified lay teachers in non-public schools. After 1972, the ceiling would rise to 75% of the salaries.

Secular Service Restrictions

Secular subjects are defined to be "courses of instruction commonly taught in the public schools ... including but not limited to language skills, mathematics, science, geography, economics, history...." Textbooks used in these courses must meet the same criteria used to judge texts in the public schools. Teachers may not be members of any religious order, nor may they wear "any distinctive habit." Courses dealing with religious tenets are expressly excluded from those for which salary aid is available. Teachers can be reimbursed only for time actually spent teaching secular courses.

Other Restrictions

1. Teachers must hold public school certificates from the state.
2. Non-public schools must comply with "educational standards" required by law, including those relating to the evaluation of pupils
3. The school must file a certificate indicating that it is in compliance with Title VI of the Civil Rights Act of 1964.
4. The school must maintain an accounting system satisfactory to the Superintendent for the purposes of indicating expenditures for secular education.

Constitutional Amendment

In November, 1970, a new amendment to the state Constitution was approved by the voters. Whether it makes the new law unconstitutional has not been decided at this time.

Ohio

Ohio Rev. Code Ann. § 3317.06 (Baldwin 1969)
Effective August 18, 1969

Payment

The statute sets aside monies for local school districts to use in paying salary supplements to non-public school teachers. The amount of money available to each non-public school is calcualted on an average daily attendance basis. A maximum of 85% of this "allotment" then is available for salary supplementation, with the rest going for purchase of certain materials and services. Contracts are concluded between the lay teacher and the school district, with the head of the non-public school certifying the relevant qualifying data.

The amount of supplementation which the lay teacher can receive is limited by the statute and regulations. No teacher may receive a salary (including supplementation) of more than that paid to public school teachers of comparable training and experience. No non-public school teacher may receive a supplement totalling more than $600/daily course hour; there can be no more than 5 such course hours, so the maximum supplement is $3000.

Payment is made only for the percentage of time lay teachers spend in teaching "secular courses required to be taught in the public schools" by minimum standards adopted by the State Board pursuant to section 3301.07.

Secular Service Restrictions

Not only is supplementation limited to "secular courses," but courses taught by reimbursed teachers must be courses required by the state. Textbooks and other materials in such courses must be "non-sectarian in nature." The Superintendent of Public Instructions is given the power to inspect courses of study to insure this.

Other Restrictions

a) Lay teachers must hold valid state certificates (for public schools) by July 1, 1969.

b) "Each non-public school shall establish a satisfactory program of evaluation which measures pupil achievement in required secular courses taught by teachers who are receiving" supplements.

c) The Superintendent of Public Instruction shall inspect courses of study, programs of student and teacher evaluation and pupil achievement tests to see that the schools are meeting the purposes of the act, i.e., encouraging secular instruction, promoting high quality general education, etc.

d) No services or materials can be provided for pupils in non-public schools unless also available to pupils in public school districts.

e) Service and materials and programs provided for non-public pupils cannot exceed in cost or quality such services as are provided for pupils in the public schools of the district.

f) Services and programs must be provided "without distinction as to race, color or creed of such pupils or of their teachers."

g) Schools must follow established accounting procedures (circular #1580 of 1969 - State Auditor).

h) Although the contract is negotiated directly between the school district and the eligible teacher, the non-public school must first gain the approval, by resolution, of the local public school board to apply for funds.

Guidelines

See "Guidelines for Implementation of Division H of Section 3317.06, State Department of Education (parts B I-VII); Circular #1580, November 3, 1969, Office of State Auditor.

Pennsylvania

Pa. Stat. Ann. tit. 24, §§ 5601-09 (1968)
Effective July 1, 1968

Payment

The statute creates a "Nonpublic Education Fund" out of fixed percentages of horse-racing revenues in the state. The funds are used for "purchasing secular educational services" through payments for teachers' salaries, textbooks, and instructional materials at non-public schools.

The state Superintendent pays out of the Fund by contract directly to the non-public school for these secular services. Teachers are paid on the basis of "actual reasonable cost" of their salaries, but salaries cannot be above the minimum for public school teachers. Payments are made in the school term following the term in which the services are rendered.

If the money in the Fund is not adequate to meet the total amount of validated requests for reimbursement, pro rata shares are paid.

Secular Service Restrictions

Although secular educational services are more broadly defined, the purchase of secular educational services is limited to mathematics, modern foreign languages, physical science, and physical education (s. 5604). In addition, the State Superintendent must approve the textbooks and instructional materials as secular.

Other Restrictions

1. A satisfactory level of pupil performance in standardized tests approved by the Superintendent must be attained (s. 5604).
2. After five years (1973) all teachers teaching courses under contract must be certified by the state according to standards equal to those for teachers in the public schools (s. 5604). Those teachers employed full time in non-public schools on July 1, 1968, are exempt from the certification procedure.
3. Non-public schools must comply with the safety and sanitary standards of the Department of Labor and Industry.
4. Schools must establish accounting procedures to show separate accounts for secular education under contract; account books are subject to state audit.
5. Compulsory attendance laws as listed in section 1326, 27 of the Code and as administered by the State Board of Private Academic Schools must be complied with.
6. Article 7 of Executive Directive Number 21, which prohibits discrimination in state contracts on the basis of race, religion, sex, national origin, is held by the regulations to apply on these contracts. But, the State applies the directive to this statute with the additional statement that a religious or denominationally affiliated school may "recognize the preference of parents" to have students of the same religion at the school (see Q. 24 in "40 Questions and Answers Regarding Act 109").

Guidelines

See "Rules and Regulations for Implementing the PNESEA" from Office of Aid to Non-public Schools; and "Forty Questions and Answers Regarding Act 109" prepared by the same office in January 1969.

Rhode Island

R. I. Gen. Laws Ann. § 16-51 (1969)

Payment

The statute sets aside a fund for salary supplements paid directly to teachers in non-public schools. The appropriation for fiscal 1970 is $375,000.00. The teacher must request the salary supplement directly from the state commissioner.

Fifteen percent (15%) of salary is paid to each eligible applicant. Including the supplement, the teacher's salary must meet "the minimum salary standards for public schools under title 16, chapter 7." Neither is this amount to exceed the "average maximum salary" paid to public school teachers in the state.

Only teachers of grades one through eight are eligible.

Secular Services Restrictions

The eligible teacher must teach "only those subjects required to be taught by state law . . ., or which are provided in public schools throughout the state, or any other subjects that are taught in public schools." He must not "teach a course in religion" and must sign a statement promising that he will not do so as long as the salary supplement is being received.

Other Restrictions

1. The school must be non-profit
2. It must meet compulsory attendance requirements
3. The annual per student expenditure for secular education may not equal or exceed the average per student expenditure in state public schools at the same grade level in the second preceeding fiscal year.
4. The teacher must hold a state certificate.
5. The teacher must use only materials used in public schools of the state.
6. The school must comply with Title VI of the Civil Rights Act of 1964.
7. The school's financial records are subject to state audit.

Guidelines

See "Regulations of the Commissioner of Education Governing Payment of Salary Supplements to Non-Public School Teachers."

California

Assembly Bill 2118 - Self-Determination Act
The bill was introduced in 1969 and was defeated by one vote in the Senate Education Committee. There are several versions of 2118; only the one which retains the voucher mechanism is considered here.

Payment

In "economically disadvantaged areas" (as defined by s. 6482 of the California Code), when a public school falls below minimum performance levels established by the "Director of Compensatory Education" it is designated a "demonstration school." Parents of children attending a demonstration school then become entitled to choose between:

1. attendance at other public schools operated by the district.
2. attendance at another public school operated by a community corporation.
3. attendance at an approved school operated by a private contractor.
4. continued attendance at the demonstration school.

In this situation each parent becomes entitled to a tuition voucher in the amount of $1000. The voucher may be presented to any "approved provider of educational services" which agrees to guarantee performance standards established by the Director of Compensatory Education.

Secular Restrictions

The Director may not approve any provider of educational services which is a sectarian or denominational school. In effect, no church school is eligible to receive the vouchers.

Other Restrictions

1. The school receiving vouchers must conform to standards set by the Director of Compensatory Education.
2. Such schools must provide an average monthly improvement of reading and mathematics achievement scores above the average of the demonstration school.
3. The school is liable for the safety of the pupils.
4. The school must accept pupils in the temporal order of application, except that no public school accepting voucher children must accept applications if their presence will raise the pupil-teacher ratio above 35:1.
5. The school must provide lunches.
6. The school must operate at least 4 hours per day, five days per week, nine months per year.
7. The Director of Compensatory Education may waive the requirements of the California Code relating to schools if he deems it necessary.
8. In approving schools, the Director of Compensatory Education must give preference to those who have had successful experiences in educating disadvantaged children and using "community resources."

Illinois

House Bill 2350 - Children's Educational Opportunity Act
(Passed the House but was defeated in the Senate Education Committee, June 14, 1969)

Payment

The proposed plan seeks to appropriate $26,800,000 for payments by the State Superintendent of Public Instruction to non-public schools on the basis of "warrants" given by parents to the non-public schools. Each year the parent may issue a "warrant" to the non-public school his child attends in the amount of $48 for each of his children in grades K-8 and $60 for grades 9-12. The warrant serves as partial payment of tuition. Upon completion of the school year, the non-public school submits the warrants to the County Superintendent of Schools who certifies the total amount to the State Superintendent who then arranges for payment to the non-public school.

Secular Restrictions

"These warrants shall not be used to subsidize courses of religious doctrine or worship (sec. 5)." The grant must be for "educational opportunity consistent with the goals of public education (sec. 3)."

Other Restrictions

1. The non-public school must meet academic standards for non-public schools as set out by the State Office of Public Instruction.

2. Beginning in 1975, no parent is eligible for the grants if he enrolls his child in a school which is not a "state-recognized institution."
3. No parent is eligible for the grants if the school where his child is enrolled is not in compliance with Title VI of the Civil Rights Act of 1964.
4. At the end of the school year each non-public school receiving grants must submit to the county an audit showing the cost of providing "educational opportunity" as defined in section 3.

Other Legislation Pending

In addition to House Bill 2350, there are several other proposals which would aid non-public schools. House Bill 1116 (1969) is a bill for purchase of secular educational services which would pay $60 per pupil for elementary school children and $90 per pupil for secondary school children. House Bill 46 (1969) would provide direct payments to parents whose children attended non-public schools. The amount of the payment would be equal to that which a public school would receive as state aid on behalf of the child if he attended public school in the same district. If the amount paid by the parent for tuition was less than this state aid, the lesser amount is paid.

Iowa

House File 571 (1969)

Payment

The bill provides a "credit" to the parents of a student attending a non-profit private elementary or secondary school in Iowa. The credit is given in the form of quarterly payments to the parent, and amounts to "25% of the average total expenditure per pupil per year as determined by the state department of public instruction (sec. 1)." If the student is not in attendance for the full year, the payment is pro-rated accordingly.

Secular Education Restrictions

The bill itself contains no restrictions on the use of funds. It appears that a constitutional amendment is required to make the bill effective, and one is proposed which requires the legislature to "set terms and conditions" for the use of public funds by private schools (see Senate Joint Resolution 22, 1969).

Other Restrictions

Besides the "non profit" requirement the only restriction is that schools attended by children whose parents receive aid must meet the minimum standards "as determined by the state department of public instruction (sec. 1)."

Massachusetts

House Bill 3843 (1970)

Payment

This bill provides grants of $100 to each school child in grades 1-12 in the Commonwealth. If the child's parent indicates by November 1 that he will be attending a private school in the following year, the state issues a check to the parent which can be honored for payment only when endorsed by the payee to the school the pupil attends. If the parent does not indicate by November 1 that the child will attend a private school, then the grant is paid directly to the city or town in which the child is eligible for public school. The State Board of Education is authorized to make rules and regulations for carrying out this plan.

Secular Education Restrictions

The grants can be used in any school. There is no stated restriction on their use in religious schools.

Other Restrictions

1. A school receiving the grant must be accredited by the State Board of Education and include all the subjects required to be taught under the state's education laws.
2. The Board of Education is authorized to promulgate rules "to protect the interest of the child and the Commonwealth" in carrying out the purpose of the Act.

Other Legislation Pending

Senate Bill 370 (1970) is a purchase of secular services plan. It pays the actual cost of teacher's salaries limited to the salaries available to public school teachers of similar qualifications. The definition of secular services is similar to Pennsylvania's but also includes business education, language arts, and vocational education. Salaries are paid by contract with the State Commissioner of Education, and texts must be approved by him. A satisfactory level of achievement in standardized tests is also required. As in the Pennsylvania Law there is a provision for payment of pro rata shares, if funds are not sufficient to meet demands. The open enrollment provision refers to an "offer of equal opportunity," but sets up no special enforcement mechanism.

Missouri

Senate Bill 375
1969 Educational Aids-Private School Pupil Fund

Payment

The bill would provide direct payments to parents for tuition paid to non-public schools. The parent of a child in grades 1-8 would be eligible for $50 per semester. For children in grades 9-12, the amount would be $100 per semester. These amounts would be doubled if the parent's gross income (less dependent deductions) were less than $3000 per year. If the child leaves the school, his parent is paid a prorated share of the amount titled to him.

Secular Education Restrictions

Secular education is defined as including only those subjects taught in the public schools of the state. To receive the payments, parents must send their children to a non-public school which maintains a system of accounting showing the cost of secular education. The payments cannot exceed:

1. Actual tuition;
2. Cost of education in secular subjects;
3. 80% of total per pupil costs for all subjects.

Other Restrictions

1. The school must file a certificate indicating its compliance with Title VI of the Civil Rights Act of 1964.
2. Teachers must be certified by the state.
3. The school must file the names of students and the courses in which they are enrolled.

4. The Fund set up for paying the grants includes any private or federal grants made for the benefit of private school pupils.

Wisconsin

Senate Bill 346
(Passed by the Senate in January 1970 to be
considered by the House in 1971)

Payment

The proposed legislation would appropriate $9,350,000 to provide grants to parents of elementary and secondary school children for secular education. The grant program would be administered by an "Education Aids Board" which would be an extension of the present Higher Education Board. The basic grant would be $50 for a child in grades 1-8 and $100 for a child in grades 9-12. A provision which would have doubled the amount if the parents' effective income (net taxable) were less than $3,000 and tripled the grant if the effective income were below $2,000, was deleted on the floor of the Senate.

The grants are further limited as follows:

1. The grant may not exceed 80% of actual tuition payments;
2. The grant may not exceed the school's per pupil cost of secular education or 80% of the per pupil cost of education in all subjects.

Secular Restrictions

Secular education is defined as "education in the following secular subjects: reading, spelling, language arts, physical sciences, English, foreign languages, mathematics, government, industrial arts, American History, physical education, domestic arts, or business education."

Other Restrictions

1. The non-public school must accept "supervision" in education as specified in s. 115.28 (1) and (3) of the Wisconsin Code.
2. Elementary schools must meet standards for admission to public high schools (Wisconsin Code s. 118.145).
3. Non-public high schools must be accredited by a national accrediting organization and must meet the standards for transfer to public high schools.
4. Teachers must have qualifications equivalent to those which would be required for similar teaching in the public schools, except if the teacher was already employed at the time the act became effective.
5. The school must maintain an accounting system adequately showing the cost of secular and all other education, and the accounts must be open to state audit.
6. The school must be in compliance with Title VI of the Civil Rights Act of 1964, and must file a statement indicating that it will admit residents of Wisconsin without regard to race, creed, color, or national origin.
7. The school must comply with compulsory attendance laws.

Other Legislation Pending

In addition to several bills altering individual sections of the above plan (1969 Assembly Bills 251, 1054, 801, 779), there is a purchase of secular services bill, 1969 Assembly Bill 563, which bears a strong resemblance to Pennsylvania's statute.

Court Challenges

Three of the nonpublic school aid programs summarized in this Appendix have been challenged in federal courts on the grounds that they violate the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The Pennsylvania purchase of secular services program was found to be constitutional by a three judge federal district court last December. Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969). The decision has been appealed and will be heard by the Supreme Court this winter.

The Rhode Island program, by contrast, was held to violate the Equal Protection Clause by a three judge federal district court last June. DiCenso v. Robinson, 316 F. Supp. (D.R.I. 1970). It will also be reviewed by the Supreme Court this winter.

Finally in October, a three judge federal district court held the Connecticut purchase of services program violated the Establishment Clause. Johnson v. Sanders, Civ. No. 13432 (D. Conn., Oct.15, 1970).

APPENDIX F

TREATMENT OF TITLE I FUNDS IN A DEMONSTRATION

One of the issues which must be resolved by the local community in planning for a voucher demonstration is how to coordinate the distribution of funds from Title I of the Elementary and Secondary Education Act with voucher funding. Coordination efforts must, of course, take into account the basic intent of the Act. Congress set forth the purposes of the Act in a declaration of policy which precedes the substantive provisions of the Act:

> In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance ... to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children.[1]

In order to accomplish this purpose, the Act provides that Title I projects must be "designed to meet the special educational needs of educationally deprived children in the school attendance areas having high concentrations of children from low-income families."[2] Presumably, this statutory provision was enacted because Congress felt that it was more expensive to educate a low-income child in a school largely composed of low-income children than it was to educate the same child in a school in which most of the students are from a higher socioeconomic background, and that school districts with high concentrations of poor students were likely to have a lower tax base and therefore to have fewer funds available for educational services. Under both theories, schools in such districts would be in greater need of financial assistance.[3]

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[1] 20 U.S.C. §241(a).

[2] 20 U.S.C. §241(e).

Whatever the rationale, this requirement is likely to pose problems for coordinating Title I funds with a voucher program. Eligibility for Title I funds depends on both income and attendance at an eligible school. It would be impossible, therefore, to identify eligible children before they had selected their schools and award them a share of the Title I funds as part of their voucher without violating the apparent intent of Congress.

There are at least three approaches which might be adopted:

1. Title I funds could continue to flow as they had in the past in the demonstration area. The funds would thus supplement voucher funds.
2. Title I funds might be supplanted entirely within the demonstration population. The freed Title I funds might then be either (a) concentrated on eligible schools and students outside the demonstration area(in the event that the district was larger than the demonstration site) or (b) concentrated on students in higher grades who lived in the demonstration site but were not included in the demonstration population.

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[3] See Yudof, The New Deluder Act: A Title I Primer, 2 Inequality in Education 1 (1970) published by the Harvard Center for Law and Education for a more complete discussion of Title I.

3. Title I funds might be used to supplant the compensatory OEO funds for eligible students.

1. Continuation of Title I Funding

It might be decided that Title I funds should continue to flow to eligible students in eligible schools in the voucher area just as they had prior to the demonstration. This would have the virtue of continuing the present Title I procedure, with which local and federal personnel are presumably familiar. Title I guidelines define eligible schools as those whose concentration of low-income children is as high or higher than the percentage of such children in the district as a whole.[4] (If all schools have similar concentrations, all may be eligible). Low-income children are defined as those who (1) have family incomes of less than $2000 per year or (2) are receiving Aid to Dependent Children.

Allocation might be somewhat complicated by the fact that most districts presently compute eligibility by using residential income statistics, because attendance at public schools is generally based on residence. Under a voucher system, family choice would be the allocation mechanism. The regulations do, however, provide for counting the actual number of low income students in particular schools in this event,[5] so the change should not be difficult, particularly if school income statistics were being computed already for the purpose of allocating the compensatory voucher funds.

Another difficulty with this approach is that there are severe restrictions on the use of Title I funds to help children in non-public schools. Thus public voucher schools would end up with more money than non-public voucher schools with similar students.

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[4] _ESEA Title I Program Grade No. 44_, Guidelines 1-1, March 18, 1968.

[5] _Id_.

2. Redistribution of Title I Funds Outside the Demonstration Population

Alternatively, a school district might choose to redistribute present Title I funds to students outside of the demonstration population on the grounds that educationally disadvantaged students in the area were receiving OEO compensatory funding. Title I funds would go either to higher grade levels, to pre-school programs, or to other geographic areas in the district. This option would have the advantage of achieving greater overall equity between the demonstration population and the rest of the pupils in the district.

3. Supplanting Voucher Compensatory Funds with Title I Funds

OEO might want to supplant some voucher compensatory funds with Title I funds. There are several severe obstacles to this. First, the Act is aimed only at disadvantaged students in schools with a higher than average concentration of disadvantaged students. As a result, Title I funds could not simply be added to the vouchers of all disadvantaged students. Title I funds would have to be restricted to students who enrolled in eligible schools, with OEO funds being used to augment the vouchers of similar students in other schools. These bookkeeping arrangements would have to be made after all students were admitted to a school, so that the LEA could determine which schools received Title I compensatory payments and which received OEO payments.

Title I funds come with many administrative restrictions that might create further problems. Unless the restrictions were waived, Title I funds could be expended only in very limited ways. Funds may be used in nonpublic schools, for example, only to provide public school personnel (and only to the extent necessary to provide special services such as therapeutic, remedial, or welfare services, broadened health services, school breakfasts for poor children, and guidance and counseling services). Moreover, the funds can only be used for those educationally deprived children for whose needs the special services were designed, and they can only be used when such services are not normally provided[6] by the nonpublic schools. Furthermore, Title I funds could not be used to pay the salaries of teachers or other employees of nonpublic schools except for services performed outside their regular hours.[7] Nor could they be used for constructing nonpublic school facilities.[8] Placing similar restrictions on all compensatory voucher funds would clearly be unworkable. Limiting the use of some but not all of the compensatory funds received by a school would be an administrative nightmare.

Perhaps the most serious objection to an attempt by OEO to substitute Title I compensatory funds for OEO compensatory funds is that it eliminates the major incentive for a local district to participate in the demonstration. Options one or two, therefore, seem the best approach to coordination with Title I funds.

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[6] 45 C.F.R. 116.19(e).

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